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Locus Standi and the Public Interest

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Locus Standi And The Public Interest

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I. INTRODUCTION

ONE OF THE most noteworthy developments in contemporary civil procedure has been the recent growth of litigation by individuals and groups seeking to vindicate the public interest.[1] In the wake of the ever-increasing pervasiveness of the leviathan of government, the tendency of the public has been to look to the courts for a determination of policy issues. Mistrustful of the other branches of government,[2] prospective litigants seek to challenge what they perceive as illegal official action and unconstitutional governmental behaviour. They tend to enshrine the judiciary as the only governmental body which is above political obscurantism. The belief is that the judiciary "will reach a faster and more desirable resolution of [society's] problems than the legislative or executive branches of government."[3]

The evolution of the public interest suit[4] as a vehicle for social re-

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[1] *See* Homburger, *Private Suits in the Public Interest in United States of America*, 23 BUFFALO L. REV. 343 (1974).

[2] Archibald Cox has remarked that "[m]odern government is simply too large and too remote, and too few issues are fought in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial." *Quoted in* Strong, *Bicentennial Benchmark: Two Centuries of Evolution in Constitutional Processes*, 55 N. C. L. REV. 1, 115 (1976). As Louis L. Jaffe has stated: "It has now become a commonplace [sic] that the individual citizen in our vast, multitudinous complexes feels excluded from government. . . . For these reasons procedural devices, which enable citizen groups to participate in the decision-making process and to invoke judicial controls, are very valuable." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044 (1968).

[3] H. BLACK, A CONSTITUTIONAL FAITH 11 (1968).

[4] Public interest suits are not to be confused with class action suits, although common attributes may exist. The proper distinction is crystallized by Homburger, *supra* note 1, at 387:

> Class actions proceed on the theory, or perhaps more appropriately fiction, that all persons affected by the litigation are before the court, either in person or by representation. It is true that the class-representatives are self-chosen or, in defendant's classes, chosen by plaintiff; but the constitutional conscience of the court is eased by the presence in court of persons whose claims typify those of all members of the class and by the lack of practicable alternatives for mass litigation. *There is normally no problem of standing to sue in class actions: for if the plaintiff is a proper party to press his individual claim, he invariably also has standing to sue on behalf of those whom he represents.* Public interest actions are

form has led many judges and legal scholars to question the appropriateness of judicial intervention into the field of policy-making. Public interest suits would seem to fly in the face of traditional notions of the function of the Court. Whereas the Court has historically been viewed as the proper forum for the adjudication of disputes between parties, public interest litigants often do not fit into the traditional mould of what is conceived of as a "proper party."[5]

The use of the Court as a public forum for the airing of policy issues has traditionally been curtailed by judicial self-restraint, in the exercise of w hich the standing of prospective litigants has been examined as a threshold inquiry in the determination of the appropriateness of judicial intervention. Compliance with *locus standi*, or the law of standing, has consequently become a crucial hurdle to overcome for those litigants who seek to bring legal action to advocate the public interest. Yet the erractic development of standing principles has frustrated any attempts to reduce the concept to precise enucleation. The concept of standing has been described as "among the most amorphous in the entire domain of public law"[6] and as "a hodge-podge of special instances and contradictions."[7] Professor Tushnet has declared that "the law of standing lacks a rational conceptual framework [and that it] is little more than a set of disjointed rules dealing with a common subject."[8]

In an attempt to reduce these "disjointed rules" to a common denominator, it can be said that the various tests devised to determine the requisite interest upon which a suit for judicial review may be founded tend to focus first upon "whether the interest is, in the opinion of the court, worthy of protection" and secondly, upon the propriety of judicial intervention.[9]

Notwithstanding Justice Douglas' admonition that "[g]eneralizations

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structured differently. Unlike the class action plaintiff, the public interest does not purport to represent any particular individual. He acts as a spokesman for the public at large or a segment of it. (Emphasis added).

[5] Public interest litigants are what Professor Jaffe would call "non-Hohfeldian" or "ideological" plaintiffs because they seek not to assert the personal and proprietary interest of the traditional Hohfeldian plaintiff (a phrase derived by Jaffe from W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923)), but rather the representational and public interest of a non-Hohfeldian plaintiff in a public action. In Jaffe's terminology, a Hohfeldian plaintiff is one who is seeking a determination that the has a right, a privilege, an immunity or a power. *See* Jaffe, *supra* note 2, at 1033.

[6] *Judicial Review: Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2 app. 498 (1966) (statement of Paul A. Freund) [hereinafter cited as *Judicial Review Hearings*].

[7] Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 258 (1961).

[8] Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

[9] S. M. THIO, LOCUS STANDI AND JUDICIAL REVIEW 13-14 (1971).

about standing to sue are worthless as such,"[10] this article will proceed to scrutinize the utilization of standing as a tool of judicial self-restraint and as a sifting device in the determination of the propriety of judicial intervention into public interest controversies. In addition, the article will attempt to propound the "rational conceptual framework" which Tushnet alleges the law of standing lacks,[11] and to utilize this framework in an explication of the major public interest cases which have confronted the concept of standing.

In those cases in which judicial restraint is exercised to deny standing to public interest litigants, certain underlying inhibitory notions have been brought to bear. Three such notions which consistently arise in cases in which standing is in issue are related to the judicial conception of the role, the power, and the limited resources of the Court.

A. The Role of the Court

In the administration of justice in common law jurisdictions, the entire system has been geared towards the adjudications of disputes between parties. Many jurists would argue that

> [t]his clash of adversaries, this dialectic conflict between opposite parties is the most effective way, not only of securing that the interests of the litigant parties are fully represented but also of ensuring that any public interest that may arise or emerge in the proceedings will be fully placed before the Court and thus be safeguarded and represented.[12]

Does this traditional conception of the role of the Court allow for the adjudication of suits which directly involve interests transcending those of the parties before the Court?[13] The plaintiff in a public interest suit is not a traditional plaintiff:[14] he does not seek to assert the violation of a legal right personal to himself. Instead, he seeks to challenge the constitutionality of legislation or to assert the illegaility of official action. In doing so, the plaintiff alleges no particular injury or infringement of rights beyond that felt by the public in general.[15]

There exist a number of arguments for denying standing to those plaintiffs who do not fit within the traditional mould of adversarial pro-

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[10] Association of Data Processing Serv. Orgs. v. Camp (Data Processing), 397 U.S. 150, 151 (1970).

[11] Tushnet, *supra* note 8, at 663.

[12] I. H. Jacobs, The Representation of the Public Interest in English Civil Proceedings 6 (unpublished work).

[13] *See* Homburger, *supra* note 1, at 343.

[14] *See* Jaffe, *supra* note 2, at 1034.

[15] *See* Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B. U. L. REV. 807, 827 (1977): "The injury sustained, if any, is to the ideology or social conscience of the plaintiffs." He argues, therefore, that "the use of non-traditional plaintiffs sacrifices an important feature of judicial review: the sensitivity of courts to the impact of challenged laws upon affected individuals." *Id.*

ceedings. One such argument has been based upon the contention that only concrete adverseness can assure that the issues are framed and presented with sufficient specificity for consideration by the Court.[16] It is the substance of such a contention that only a party whose legal position is affected by the Court's judgement can be relied upon to present a serious, thorough and complete argument.[17] Such contention, however, ignores the fact that many public interest litigants are similarly committed to their cause, and will fight for it just as vehemently and will prepare for its presentation just as, if not more, meticulously as private litigants.[18]

Professor Jaffe, in his consideration of the propriety of judicial intervention into issues raised by what he calls "ideological" or "non-Hohfeld ian" plaintiffs, points out that the element of financial investment in litigation is functional in ensuring a serious and proper presentation:

> If it were thought that self aggrandizement is a more dependable motive than ideological interest, I would point out that it usually requires a financial outlay to undertake a lawsuit, so that once launched on the lawsuit the ideological plaintiff has, at least, committed a sum of money and so, in some sense, has a financial investment to protect. But the very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in support of one's contention.[19]

Another argument for denying standing to a non-traditional plaintiff concerns the *res judicata* effect of a judicial pronouncement. The fear is that the courts, in entertaining proceedings outside of the traditional adversarial context, may prejudice persons not party to the litigation. Whereas the effect of *res judicata* in disputes as between parties is to preclude only those parties from subsequent litigation of the same issues,[20] public interest suits evoke broader judicial pronouncements and the *res judicata* effect is more far-reaching.

It must be noted, however, that when the Court is considering impugned legislation or allegedly illegal official action which a public interest litigant seeks to attack, it is a matter of public interest that matters be set right and the effect upon the public as a whole can therefore be seen as a right and proper consequence of the determination of the

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[16] *See* Baker v. Carr, 369 U.S. 186 (1962).

[17] *See* Jaffe, *supra* note 2, at 1037.

[18] *But see* Homburger, *supra* note 1, at 348: ". . . the very fact of ideological zeal may make such plaintiffs poor representatives because they tend to take risks in instituting broadly phrased challenges."

[19] Jaffe, *supra* note 2, at 1037; *see also* Kennedy, *Beyond 'Sunshine' - Promoting Effective Citizen Participation in the Federal Administrative Process*, 13 TRIAL 41, 43 (1977).

[20] *See* Brilmayer, *supra* note 15, at 823, where he states, "[o]nce threat of harm is established, that the judgment will have a *res judicata* effect as to the parties guarantees that the court is promulgating rules not in the abstract but incident to the determination of rights of litigants before it."

Court.[21]

B. The Power of the Court - Separation of Powers Notions

Central to a determination of the propriety of judicial intervention is the concept of the Court as an intrinsically distinct branch in the tripartite allocation of governmental power. The notion of separation of powers has often served to bolt the doors of standing to litigants seeking a determination by the judiciary on public interest issues.

According to the notion of separation of powers, the three main branches of government - the executive, the legislature and the judiciary - each have their respective and exclusive powers. In a democracy, the legislature is in power because of, and is therefore ultimately responsible to, the will of the majority. If it takes legislative measures or embarks upon programs which are unappealing to the public at large, the power of displacement rests in that majority. The legislature's machinery for the instigation and administration of social change is intricate and extensive. Its fact gathering techniques range from departmental investigations through committee hearings to full scale governmental inquiries. "In any one of these settings, expert knowledge can be presented and sifted in its full complexity and then assessed by legislators who have varying backgrounds and experience and represent many different constituencies among the public."[22] The judiciary, on the other hand, is not a representative institution; it has no initiating powers and is without a staff for the gathering of information.[23] Therefore, it is often argued that the judiciary should leave issues of public policy to the exclusive territory of the legislature.

The legislature receives its mandate from the majority, and in fulfilling the terms of that mandate, must meet the approval of the majority as to what is in the public interest. Consequently, certain less influential interests may be overlooked or overridden.[24] The judiciary, as an independent branch, must apply higher principles of justice to *all*, including the minority interests which may appear to the legislature to be inimical to the will of the majority. The Court's aloofness from the fray of public opinion can in itself be a great advantage when it becomes necessary to adjudicate fairly upon situations involving individuals or groups who are

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[21] *See* G. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 124 (1968). *See also* Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L. REV. 181, 210 (1978), wherein it is argued that the traditional notion of *res judicata* "be modified in order to allow the effective judicial protection of diffuse rights."

[22] P. WEILER, IN THE LAST RESORT 47 (1974).

[23] *See* Jaffe, *supra* note 2, at 1037.

[24] *See* J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 76 (1978): "Public interest law clients, for the most part, turn to the law because they lack the resources to press their interests in the market or the political arenas."

either unrepresented in the political arena or seen as unpopular by the general public.[25]

The two classic viewpoints on the question of the extent to which the aspect of the separation of powers notion which emphasizes the majority/minority distinction should influence or inhibit judicial intervention into public policy are presented by Philip B. Kurland and Louis L. Jaffe. According to Kurland, the Court's most important function of protecting individuals against the overstepping purview of government and minorities against oppression by majorities is essentially anti-majoritarian and therefore:

> it ought not to intervene to frustrate the will of the majority except where it is essential to its function as guardian of interests that would otherwise be unrepresented in the government of the country. It must, however, do more than tread warily. It must have the talent and recognize the obligation to explain and perhaps persuade the majority's representatives that its reasons for frustrating majority rule are good ones.[26]

As an advocate of greater judicial intervention in public interest issues, Louis B. Jaffe declares:

> From the very beginning, both our Constitution and our practice has sought to protect the individual *qua* individual and *qua* member of minority from the abuse of power by the majority or by government in the name of the majority, despite the fact that majority rule through representation is the central institution of our democracy. Futhermore, democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking.[27]

C. *The Limited Resources of the Court - or - The Floodgates Fear*

Much of the reticence of the judiciary to intervene in matters of public interest *per se* goes beyond the traditional notion of the role of the Court and beyond the theoretical limitation[28] on the power of the Court; it involves a matter of much more practical suasion. Simply stated, many of the judiciary fear that to open wide the door of the Court to public interest litigants would be to risk opening the virtual floodgates to a multiplicity of proceedings. It is felt that these litigants "disproportionately divert the Court's attention and energy from pressing criminal, anti-trust

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[25] The case of the unpopular client and the harassment of lawyers for the representation thereof is examined in V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 576 *et seq.* (1966).

[26] P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 204 (1970).

[27] Jaffe, *supra* note 2, at 1045.

[28] The limitation on the power of the Court under the notion of separation of powers is generally considered in the United States to be a matter of doctrinal application arising out of Article III of the Constitution. *But see* text accompanying notes 84-86, *infra.*

or other private civil litigation."[29]

This inhibition, although in theory unrelated to a standing analysis,[30] has in practice persistently been applied as a reason for denying standing. The burden on the "limited resources of the Court" is thereby reduced, "not so much from the elimination of the individual case in which the plaintiff is held to lack standing as from the likelihood of the exclusion of that type of case from the demand function and from future queries."[31]

II. The Concept of Standing As Applied By the United States Court

In the United States, the Supreme Court has articulated numerous tests for establishing the standing of public interest litigants. These tests have varied according to the prevailing judicial conception of the function of the Court and the judicial perception of the significance of the issues raised.[32]

A. Frothingham to Flast

The influence of the above mentioned inhibitory notions upon the exercise of judicial restraint is clearly apparent in *Massachussets v. Mellon (Frothingham)*,[33] the classic American pronouncement on standing. In that case, standing was denied to a federal taxpayer who sought to challenge the constitutionality of an Act of Congress which provided for federal grants to state programs aimed at reducing maternal and infant mortality. The plaintiff argued that the grant-in-aid program was in excess of the powers of Congress in that it encroached upon the power of local self government reserved to the States by the tenth amendment.[34]

In founding her standing upon the status of taxpayer, it was the

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[29] Schaffner, *Standing and the Propriety of Judicial Intervention: Reviving a Trational Approach?*, 52 Notre Dame Law. 944, 945 (1977).

[30] Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 669 (1973), argues that the standing inquiry should essentially be directed towards an examination of whether the plaintiff is a "proper party" and whether he has a "sufficient personal interest" in the litigation.

[31] Scott asserts that standing principles have two distinct functions: the rationing of scarce judicial resources and the determination of the Judiciary's proper policy-making role. *Id.* at 672.

[32] P. Kurland, *supra* note 26, at 2, asserts that the United States Supreme Court "has always operated—and operates still—somewhere between the judicial mode and the political mode." The treatment by the American courts of public policy issues is considered by J. Grossman, Constitutional Law and Judicial Policy Making 28 (1972): "Even though Americans do not usually perceive their courts as policy-makers, they often bring important controversies to them. The power of courts to review the constitutionality of legislative and executive action, commonly called the power of 'judicial review,' constantly involves American courts in conscious policy-making."

[33] 262 U.S. 447 (1923).

[34] *Id.* at 475.

plaintiff's contention that she would be adversely affected by the impugned appropriations due to the increased burden of future taxation. She asserted that to be so burdened was in effect to be deprived of her property without due process of law.[35] While recognizing the litigable interest of a municipal taxpayer in the proper application of funds by his municipality,[36] the Court was unprepared to extend the notion of taxpayer standing to the federal context where the effect of an expenditure upon future taxation was ostensibly "remote, fluctuating, and uncertain."[37] A distinction was drawn between the "direct and immediate" interest of municipal taxpayer[38] and the "comparatively minute and indeterminable" interest of a federal taxpayer who shares that interest with millions of others.[39]

Mr. Justice Sutherland, in delivering the opinion of the Court, seemed to shudder at the "bare suggestions" of taxpayer standing *per se*.[40] The judicial fear of the multiplicity of proceedings which might ensue with the "attendant inconveniences" was such as to sustain the conclusion of the Court that some direct injury beyond that suffered by an individual taxpayer must be established in order to satisfy standing requirements.[41]

The separation of powers doctrine was invoked to explain the impropriety of judicial intervention into a field of inquiry which was seen as essentially legislative. According to this doctrine, whereby the functions of government are exclusively apportioned, the Court found the judiciary to have "no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional."[42] Rather, its power was held to be limited to the exercise of ascertaining and declaring the law as applicable to situations of specific controversy arising from some direct injury suffered or threatened which presents a justiciable issue.[43] It was held that a prospective party seeking to invoke the power of the judiciary has not satisfied the "direct injury" requirement if he is able merely to estab-

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[35] *Id.* at 486.

[36] *Id.*

[37] *Id.* at 487.

[38] *Id.* at 486.

[39] *Id.* at 487.

[40] As stated by Justice Sutherland:

> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes so far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.

Id. at 487.

[41] *Id.*

[42] *Id.* at 488.

[43] *Id.*

lish that he suffers injury "in some indefinite way in common with people generally."[44]

Although *Frothingham* was primarily concerned with the standing of a taxpayer to bring suit, the broader pronouncements on the concept of standing in terms of general judicial restraint and reluctance to adjudicate upon constitutional issues[45] survived intact for over 40 years as an effective barrier to the litigation of public interest suits.

In 1937, *Ex parte Levitt*[46] reaffirmed the principle that a private litigant may invoke the judicial power to determine the validity of executive or legislative action only when he can show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action and not when he is able to show only a general interest common to all members of the public.[47]

Tennessee Electric Power Company v. T.V.A.[48] tightened the "direct injury" principle by requiring a concomitant allegation by litigants of a violation of a legal right[49] sufficient to set them apart from other members of the general public.[50] This "legal rights" requirement, however, was subsequently disposed of in 1940 in *F.C.C. v. Sanders Brothers Radio Station.*[51] In *Sanders*, the economic injury to the complainant, even in the absence of a legally protected interest, was held to be sufficient to satisfy the "direct injury" requirement for standing.[52]

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[44] *Id.*

[45] This reluctance was reiterated in Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936), where the Court emphasized "the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress." *Id.* at 345. In its decision, the Court outlined a series of seven rules under which it has avoided constitutional adjudications. *Id.* at 346-48. *See also* Baker v. Carr, 369 U.S. 186 (1962), where it was held that the Court could not rule on the constitutionality of a statute unless called upon to adjudge the legal rights of litigants in actual controversies. There the gist of the question of standing was held to rest upon whether the litigant had alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204.

[46] 302 U.S. 633 (1937).

[47] *Id.* at 634.

[48] 306 U.S. 118 (1939).

[49] Such a right was defined as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137.

[50] This stricter requirement was also applied in Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1948), where the Court declared that in order to have standing to sue, a litigant must demonstrate "an injury or threat to a particular right of [his] own, as distinguished from the public's interest in the administration of the law."

[51] 309 U.S. 470 (1940). *See also* Homburger, *supra* note 1, at 392: "Retrospectively seen, *Sanders* sounded the death knell to the 'legal rights' doctrine."

[52] 309 U.S. at 476-77. *See also* Scripps Howard Radio, Inc. v. F.C.C., 316 U.S. 4 (1942). Both *Sanders* and *Scripps Howard* involved the application of the Communications Act of 1934, Pub. L. No. 416, §402(b)(2), 48 Stat. 1093 (1934), which specifically conferred standing upon "aggrieved persons" to seek judicial review under the statute. For further discussion of

The possibility of state taxpayer standing was acknowledged in *Everson v. Board of Education*[53] and in *Doremus v. Board of Education*[54] for situations wherein "special injury" could be established. It was not until the 1968 decision of *Flast v. Cohen*,[55] however, that the doors of standing began to creak open to the possibility of airing broader public interest causes in the courts.

As in *Frothingham*,[56] the plaintiff in *Flast* sought to establish standing by the assertion of status as taxpayer.[57] The case involved a challenge to the constitutionality of an Act of Congress which appropriated federal funds for the financial support of private religious schools.[58] The plaintiff attacked the statute on the ground that it violated the Establishment Clause of the first amendment.[59] Noting that the Establishment Clause specifically limits the taxing and spending power conferred upon Congress by article I, section 8 of the Constitution, the Court held that the plaintiff as taxpayer had standing to challenge congressional action which derogated from such limitations.[60]

In sharp distinction from the thrust of the *Frothingham* decision, the *Flast* Court chose to focus not on the alleged injury of the plaintiff, but rather on her alleged status.[61] This status-oriented inquiry required that the Court look beyond the plaintiff to the substantive issues to "determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[62] Such an inquiry was considered to be "essential to assure that [the plaintiff was] a proper and appropriate party to invoke federal judicial power."[63]

The logical nexus which the Court required of a litigant asserting a status of taxpayer was bifurcated: It was held that a logical link must be established firstly between the status asserted and the type of legislative enactment attacked[64] and secondly between that status and the precise

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the treatment of the notion of statutory standing by the Court, see text accompanying notes 104-25, *infra*.

[53] 330 U.S. 1 (1946).

[54] 342 U.S. 429 (1952). In *Doremus*, the Court held that as long as "a direct dollars and cents injury" could be established by the litigants, "it would not matter that their dominant inducement to action was more religious than mercenary [for it] is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Id.* at 434-35.

[55] 392 U.S. 83 (1968).

[56] 262 U.S. 447 (1923).

[57] 392 U.S. at 84.

[58] *Id.* at 85. For an interesting outline of the political/legal background of *Flast*, see J. ABRAHAM, FREEDOM AND THE COURT 337-40 (1977).

[59] 392 U.S. at 86.

[60] *Id.* at 105-06.

[61] 392 U.S. at 101.

[62] *Id.* at 102.

[63] *Id.*

[64] *Id.*

nature of the constitutional infringement alleged.[65] Although no member of the Court gave reasons why the "logical nexus" test should have the magical effect of establishing standing,[66] there is a possible explanation. For whatever reason, the Court apparently wished to preserve the *Frothingham* principles. Yet, without the *Flast* exception, the Establishment Clause could have been rendered meaningless, for even if Congress openly violated the Constitution by establishing and financing a religion, it could be argued, according to strict *Frothingham* principles, that no one suffered a particular injury sufficient to challenge the Congressional action.[67]

According to the Court in *Flast*, the plaintiff in *Frothingham* had been able to establish the first nexus, i.e., between the plaintiff's status as taxpayer and the federal spending program she attacked, but had lacked standing because of her failure to establish the second nexus, i.e. her constitutional attack on the Maternity Act was not based on an alleged breach of a specific constitutional limitation upon the taxing and spending power.[68]

The significance of the *Flast* decision lies in the constitutionalization of the standing requirement.[69] While the *Frothingham* approach to the standing issue was from a broad conceptual perspective with the abovementioned inhibitions on judicial intervention clearly in view,[70] the *Flast* approach brought the constitutional aspects into sharp focus. The threshold inquiry in *Flast* focussed on article III of the Constitution, which restricts the function of the Court to the consideration of "cases" and "controversies."[71] The case or controversy requirement was held to be fulfilled if the litigant could establish a personal stake in the outcome of the controversy,[72] such as that enunciated in *Baker v. Carr*.[73]

Assuming that the *Flast* Court did not obliterate the *Frothingham*

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[65] *Id.*

[66] In his dissent, Justice Harlan remarked upon the "absence of any connection between the Court's standard for the determination of standing and its criteria for the satisfaction of that standard." *Id.* at 124 (Harlan, J., dissenting).

[67] *See* Wilson, *Opening the Door, Not the Floodgates: An Adaption of Canadian Standing Criteria to Citizen or Taxpayer Suits in the United States* 26 EMORY L. J. 185, 189 (1977).

[68] Flast v. Cohen, 392 U.S. at 93-94.

[69] While the appellants in *Flast* contended that *Frothingham* "expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist," 392 U.S. at 93, the government asserted that *Frothingham* "announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in considerations of the doctrine of separation of powers." *Id.* at 92. Chief Justice Warren, while having mentioned that the *Frothingham* decision "can be read to support either position," considers that the concrete reasons given in the decision for denying standing "suggest that the Court's holding rests on something less than a constitutional foundation." *Id.* at 93.

[70] I.e., the role, power, and limited resources of the Court. 262 U.S. at 448.

[71] U.S. CONST. art. III, §2, cl. 1, *construed in* Flast v. Cohen, 392 U.S. at 94.

[72] Flast v. Cohen, 392 U.S. at 99.

[73] 369 U.S. 186 (1962), *approved* 392 U.S. at 99.

principles, this "personal stake" requirement could be satisfied in one of two ways: (1) by the allegation of a "direct injury" beyond that suffered in common with people generally; and (2) by the establishment of the Court-created "logical nexus." This interpretation of *Flast* is borne out by the later judgement of the Court in *United States v. Richardson*[74] and *Schlesinger v. Reservists Committee to Stop the War.*[75]

In delivering the opinion of the Court in *Flast*, Chief Justice Warren introduced the three inhibitory notions — discussed above as influencing the exercise of judicial restraint — into this constitutional analysis of the standing requirement.[76] According to his explication of article III, the words "cases" or "controversies" served two functions: (1) to limit the role of the Court to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process;" and (2) to define the role of the judiciary "in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[77] He describes justiciability as the "term of art" which is employed to "give expression to this dual limitation"[78] and the concept of standing as an "aspect of justiciability."[79] While acknowledging the "complexities and vagaries" which surround the concept of standing, displayed particularly by its confusion with other concepts also extant under the rubric of justiciability,[80] the Chief Justice pointed out the distinctiveness of standing in that it "focuses on the party . . . and not on the issues he wishes to have adjudicated."[81] Thus, while a party may properly establish his standing to sue, the Court may nevertheless decline to consider the merits because of some limitation on the justiciability of the issue, such as the political question doctrine.[82]

According to this analysis of article III, Warren asserts that the constitutional question of standing is related *only* to the adversary context

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[74] 418 U.S. 166 (1974).

[75] 418 U.S. 208 (1974).

[76] 392 U.S. at 95.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 98.

[80] *Id.* at 99. *See* Scott, *supra* note 30, at 683:

> In determining whether to decide a plaintiff's case, the courts at times have to consider many factors besides whether the harm being done the plaintiff and those in a similar position warrants the expenditure of judicial resources. These factors are given a multitude of labels which overlap and are never clearly defined. Along with standing one finds ripeness, exhaustion, waiver, implied preclusion, reviewability, justiciability, political question, advisory opinion, mootness, case or controversy, and so on—the whole arsenal of considerations and techniques for avoiding decision of the merits of plaintiff's claim.

[81] Flast v. Cohen, 392 U.S. at 99. Chief Justice Warren went on to reiterate that "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100.

[82] *Id.* at 100.

limitation and *not* to separation of powers problems, which should arise only from the substantive issues.[83] He states that the possibility that "the substantive issues in the litigation might be nonjusticiable" is not relevant to the incipient question of standing.[84] Nevertheless, in order to determine whether there is a logical nexus to sufficiently establish the personal stake necessary for the article III case or controversy requirement, Warren indicates that "it is both appropriate and necessary to look to the substantive issues.[85]

The floodgates worry expressed in *Frothingham*[86] was considered by Warren in *Flast* to have rested upon something less than a constitutional foundation, and to have suggested "pure policy considerations."[87] Critical of *Frothingham* for its suggestion that the plaintiff's small tax bill precluded her standing,[88] Warren pointed out that the assumptions which the *Frothingham* Court brought to bear in their consideration of policy have been rendered somewhat anachronistic by modern conditions, where certain taxpayers have a greater monetary stake in the federal treasury than they do in the municipal treasury.[89]

The fear expressed in *Frothingham* that the opening of the doors of standing to one taxpayer *qua* taxpayer would lead to the inundation of the Court with "countless similar suits"[90] was mitigated in Warren's opinion by the devices of class action and joinder which became available subsequent to the *Frothingham* decision.[91]

Concurring in *Flast*, Justice Douglas considered the floodgates inhibition in relation to the determination of standing. In refuting the ominous prophecy that there would be an inundation of the courts if taxpayer's suits were permitted, Douglas contended, *inter alia*, that the exercise of judicial discretion is an effective and appropriate means of curtailment.[92] Douglas emphasized the anachronistic element of the *Frothingham* rule against taxpayer standing and urged its obliteration. Noting that *Frothingham* has been decided "in the heyday of substantive due process when the courts were sitting on the wisdom or reasonableness

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[83] *Id.* at 102.

[84] *Id.* at 101.

[85] *Id.* at 102.

[86] 262 U.S. at 487.

[87] 392 U.S. at 93.

[88] *Id.*

[89] *Id.*

[90] 262 U.S. at 487.

[91] Flast v. Cohen, 392 U.S. at 94. *See* FED. R. CIV. P. 18-20, 23 (1966).

[92] 392 U.S. at 112 (Douglas, J., concurring), citing Ferry v. Williams, 41 N.J.L. 332, 339 (Sup. Ct. 1879), wherein the court stated: "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the Court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks."

of legislation"[93] so that a "contrary result . . . might well have accentuated an ominous trend to judicial supremacy,"[94] Douglas asserted that the Courts no longer undertake to exercise such a revisionary power. He acknowledged the importance of the tripartite allocation of powers, but he balanced this against the role which the judiciary was designed to play in protecting the individual against constitutionally prohibited conduct by the other two branches of government.[95] In doing so, he remarked that "[w]ith the growing complexities of government [the Court] is often the one and only place where effective relief can be obtained"[96] and stated that it is virtual abdication of responsibility for the Court to close its doors to individuals alleging violations of constitutional guarantees.[97] Also germane to the separation of powers consideration was Douglas' adoption of the philosophy that the importance of the role that the Court was designed to play lay in its guardianship of basic rights against majoritarian control.[98]

According to the dissenting opinion of Justice Harlan, the plaintiff in *Flast* was not seeking to assert the personal and proprietary interest of a traditional plaintiff, but rather the public and representative interest of a non-Hohfeldian plaintiff in a public action;[99] realistically, her complaint was brought, not as a taxpayer, but as a "private attorney-general" to vindicate the public interest.[100] Although Harlan did not think that non-Hohfeldian plaintiffs as such were *constitutionally* excluded from the Court, he placed great stress upon the relevancy of separation of powers problems to the exercise of discretion on the standing issue in public interest litigation where "judicial forebearance [is] the part of wisdom."[101] He was fearful that unrestrained public actions might serve to "alter the allocation of authority among the three branches of the Federal Government."[102]

It was suggested by Harlan that the separation of powers problems which arise in public interest litigation could be solved by the Congressional authorization of such suits. Any hazards to the tripartite allocation

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[93] Flast v. Cohen, 392 U.S. at 107.

[94] *Id.*

[95] *Id.* at 110.

[96] *Id.* at 111. As stated further by Justice Douglas, "The Constitution even with the judicial gloss it has acquired plainly is not adequate." *Id.*

[97] *Id.*

[98] *Id.* at 110.

[99] *Id.* at 119 n.5 (Harlan, J., dissenting). *See* Jaffe, *supra* note 2.

[100] 392 U.S. at 119 (Harlan, J., dissenting).

[101] *Id.* at 130. According to Harlan, "public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. Although . . . such actions [are] within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority." *Id.* at 132.

[102] *Id.* at 130.

of authority, he stated, would be "substantially diminished if public actions [were] pertinently authorized by Congress and the President."[103]

Before proceeding with an analysis of the judicial refinements of the rules of standing pursuant to the *Flast* decision, this notion of "statutory standing" must be examined.

B. Statutory Standing

The ability of Congress to confer standing upon public interest litigants has been confirmed by Justice Jerome Frank in the 1943 decision, *Associated Industries v. Ickes*.[104] In his judgement, Justice Frank coined the concept of the "private attorney-general" as a characterization of such litigants.[105] He described Congress' power to confer standing as follows:

> Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory duties; for there is an actual controversy and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest.[106]

The concurring opinion of Justice White in *Trafficante v. Metropolitan Life Insurance Company*[107] indicates that it is within the power of Congress to confer standing by legislation when the Court might otherwise deny it.

The notion that a private individual should be permitted to vindicate the public interest is derived historically from the "informer's action" and "relator's action" in English law.[108] In the United States, these *qui tam* actions[109] depend to a large extent on express congressional authorization.[110] What then, is the constitutional basis for such "statutory standing" conferred by Congress? It has been suggested by Professor Tushnet that the constitutional justification can be found in the Necessary and Proper clause:[111]

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[103] *Id.* at 132.

[104] 134 F.2d 694 (2d Cir. 1943).

[105] *Id.* at 704.

[106] *Id.*

[107] 409 U.S. 205, 212 (1972).

[108] *See* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 10 RUT. L. REV. 863, 882 (1977); *see also* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L. J. 816-27 (1969).

[109] *See* United States ex rel. Vance v. Westinghouse Elec. Corp., 363 F. Supp. 1038, 1040 n.1 (W.D. Pa. 1973): "*Qui tam* is the phrase used to describe an informer's action brought by one who sues for the State or the United States as well as for himself."

[110] *See* Sedler, *supra* note 108, 882. *See also* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 84 (2d Cir. 1972).

[111] U.S. CONST. art. I, §8, cl. 18.

> Congress, in exercising some enumerated power, may take substantive action and also grant liberal standing as a necessary and proper means of guaranteeing the effectiveness of that action. For example, Congress passed the Clean Air Act pursuant to the commerce power, and chose to extend standing to all citizens as a necessary and proper means of securing the benefits conferred by the Act.[112]

The authority of Congress to confer the standing necessary for *qui tam* actions is now generally accepted,[113] even by those who would assert the propriety of a restrictive standing approach. Justice Powell, for example, has recognized "the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing."[114] Harlan in *Flast* and Powell in *Richardson* viewed the statutory grant of standing as a possible means of overcoming the separation of powers inhibition to public interest suits. In *Flast*, Harlan argued that this inhibition could substantially be diminished if such suits were "pertinently authorized by Congress and the President."[115] In the words of Powell, "objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make 'judicial forebearance the part of wisdom.' "[116]

The authority of Congress to confer statutory standing cannot, however, in any situtation be extended so as to direct the Court to entertain suits of a character which is inconsistent with the judicial function under article III.[117] For example, it is not within the power of Congress to confer jurisdiction on federal courts to render advisory opinions,[118] to entertain "friendly suits,"[119] nor to resolve political questions.[120] It is only where the dispute is otherwise justiciable that the question of standing is within the power of Congress to determine.[121]

Although some Congressional grants of standing such as those found in the Clean Air Act[122] explicitly confer citizen standing and the public interest suits arising therefrom are not met with any standing hindrances by the Court,[123] others confer standing to a more vague category of persons often described as "injured" or "aggrieved" without the inclusion of

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[112] Tushnet, *supra* note 8, at 670.

[113] Such statutory standing may extend to actions by "private attorneys-general" against private parties or to those against the government itself.

[114] United States v. Richardson, 418 U.S. 166, 193 (1974).

[115] 392 U.S. at 132.

[116] United States v. Richardson, 418 U.S. at 196 n.18 (Powell, J., concurring), quoting Harlan, J., dissenting in Flast v. Cohen, 392 U.S. at 130.

[117] *See* Association of Data Processing Orgs., Inc. v. Camp, 397 U.S. 150, 155 (1970).

[118] Muskrat v. United States, 219 U.S. 346 (1911).

[119] United States v. Johnson, 319 U.S. 302 (1943).

[120] Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[121] *See* Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). *See also* Berger, *supra* note 108, at 837 *et seq.*; Jaffe, *supra* note 2, at 1044.

[122] 42 U.S.C. §§7401-7402 (1977).

[123] *See* Sedler, *supra* note 108, at 884.

a definition of these terms. The latter type of statutory standing is illustrated by section 10 of the Administrative Procedure Act.[124] In judicial review of administrative action, prospective litigants who are not expressly authorized by the former type of statute to challenge action taken pursuant thereto would invoke section 10 which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[125]

Because of the inherent ambiguity in the amorphous wording of such general grants of standing, the Court has for the most part construed them so as to require the satisfaction of the same constitutional tests which have been invoked in non-statutory suits in which standing has been in issue. Therefore, it is appropriate to continue our consideration of the dynamics of the rules of standing as they have developed in cases arising from both statutory and non-statutory situations.

C. *In the Wake of Flast*

Although *Flast* concerned a litigant whose standing was contingent upon her status as taxpayer,[126] the pronouncements regarding standing had a sweeping effect upon all areas of public interest law. In the intervening years between the decision itself and the subsequent application of its principles to other actual taxpayer suits,[127] the Court extended and amplified the *Flast* holding in a variety of public interest suits.

The *Flast* constitutionalization of the standing requirements was applied in two 1970 companion cases, *Association of Data Processing Service Organizations Inc. v. Camp*[128] and *Barlow v. Collins*,[129] as the first arm of a stricter two-fold test of standing. In these cases, the Court required the plaintiff to first of all satisfy the article III case or controversy requirement by establishing a personal stake in the outcome of the controversy. The Court indicated that this could be accomplished by the alle-

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[124] *See, e.g.*, Administrative Procedure Act of 1970, §10, 5 U.S.C. §702 (1976). Judicial review of administrative action constitutes a major portion of the federal case load. *See* Comment, *State Standing to Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1094 (1977). As early as 1954, Mr. Justice Frankfurter noted that "review of administrative action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits." Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957).

[125] Administrative Procedure Act of 1970, §10, 5 U.S.C. §702 (1976).

[126] 392 U.S. at 84, 102.

[127] *See, e.g.*, U.S. v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[128] 397 U.S. 150 (1970).

[129] 397 U.S. 159 (1970).

gation of "injury in fact, economic or otherwise."[130] Secondly, the Court required that the specific interest to which injury is alleged be arguably within the "zone of interests" protected or regulated by the statute or constitutional guarantee in question.[131] This second arm of the test, though clearly unrelated to the constitutional limitations on the jurisdiction of the Court, may exhibit an inclination on the part of the Court to "go the extra mile" in imposing its own rules of self-restraint. Yet curiously enough, in spite of the articulation and application of the more intricate two-fold test, the ultimate effect of both *Barlow* and *Camp* was to relax the standing requirements. First of all, the Court in *Camp* firmly and finally rejected the notion that the interest to which injury is alleged must be a "legal interest."[132] Secondly, the Court suggested that in the allegation of a specific interest which is to be arguably within the proper "zone of interests," an interest which reflects not only economical but "aesthetic, conservational, and recreational" values would be sufficient.[133]

Because both *Camp* and *Barlow* were cases in which the "palpable economic injury"[134] of the litigants was involved, however, the Court did not address itself to the question of what must be alleged by persons claiming an injury of a noneconomic nature to interests that are widely shared. This question was addressed two years later in *Sierra Club v. Morton*[135] where the assertion of an adverse effect upon the aesthetics and ecology of an area was held to amount to an "injury in fact" sufficient to establish standing under section 10 of the Administrative Procedure Act.[136] Mr. Justice Stewart, in delivering the opinion of the Court in *Sierra Club*, expressly acknowledged that values may be asserted by individuals before a court, notwithstanding the fact that they may be held in common with the general public.[137] All that is required is that in attempting to satisfy the "injury in fact" test, the litigants assert specific injury to themselves.[138]

Standing was denied to the Sierra Club because of its failure to allege in the pleadings that its members actually used the recreational area it

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[130] Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. at 152.

[131] *See* Flast v. Cohen, 392 U.S. 83, 130-33 (Harlan, J., dissenting). Such statutory standing may extend to actions by "private attorneys-general" against private parties or to those against the government itself. *See* FCC v. Sander Bros. Radio Station, 309 U.S. 470, 477 (1941); Note, *Standing and the Propriety of Judicial Intervention Reviving a Traditional Approach*, 52 NOTRE DAME LAW. 944, 946 (1977).

[132] 397 U.S. at 153-54. *Compare* Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939).

[133] 397 U.S. at 153-54.

[134] *See* Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

[135] *Id.*

[136] 5 U.S.C. §702 (1976).

[137] 405 U.S. at 734. According to Justice Stewart, "[a]esthetic and environmental well-being . . . are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.*

[138] *Id.*

was seeking to protect much less that they used it in any way which would be "significantly affected" by the proposed development.[139] An amendment to the pleadings easily overcame this omission, however, and a subsequent motion by the defendants to dismiss the amended complaint was denied.[140]

The inhibitory notions which have been so often used by the Court to deny standing are also apparent in *Sierra Club*, but they are overshadowed by the Court's expressed concern in respect of environmental protection.[141]

The notion of separation of powers as an inhibition to standing did not appear to be of great influence on the Court, notwithstanding the vehement argument of the Solicitor General in which separation of powers was propounded as an enshrined constitutional doctrine.[142] The majority opinion of the Court did not even respond to the separation of powers argument of the Solicitor General other than to acknowledge that while the requirement of allegation of "injury in fact" restricts judicial review to suits raised by those who have a direct stake in their outcome, it "does not insulate executive action from judicial review."[143]

The article III case or controversy limitation would appear to be somewhat less stringent in cases such as *Sierra Club* in which the standing asserted has a statutory basis.[144] Nevertheless, the Court saw the adversary nature of proceedings as partly assured by the requirement that the party seeking review allege injury in fact. The effect of such a requirement is to "put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."[145] This is presumably a reference to *Flast*, where a personal stake in the outcome of the controversy was held to be essential to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[146]

The Court in *Sierra Club* also includes a footnote reference to an observation made by Alexis de Tocqueville in the 1830's concerning the effectiveness of the approach of the Court in preventing limitless attack upon legislation:

> By leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legisla-

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[139] *Id.* at 735.

[140] *See* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972). The motion to dismiss was actually urged on grounds unrelated to standing. *See also* Sedler, *supra* note 108, at 865.

[141] 405 U.S. at 734.

[142] *Id.* at 753-55 (Appendix to opinion of Douglas, J., dissenting).

[143] *Id.* at 740.

[144] The action was brought under the umbrella provision of Section 10 of the Administrative Procedure Act, 5 U.S.C. §702 (1976).

[145] Sierra Club v. Morton, 405 U.S. at 740.

[146] Flast v. Cohen, 392 U.S. at 101.

> tion is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.[147]

In regard to the floodgates inhibition, the Court, in its refusal to recognize the standing of the Sierra Club based on merely its "bona-fide special interest," is implicit in its desire to prevent judicial review "at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process."[148] The Solicitor General expressed a horror of the multiplicity of proceedings which he felt would flood the Court if standing were accorded to the plaintiff.[149]

Mr. Justice Blackmun, in dissent, would have permitted an "imaginative expansion of our traditional concepts of standing"[150] in order to enable such organizations as the Sierra Club to litigate environmental issues. He devised a test whereby the standing of an organizational plaintiff would only be recognized if the asserted interest was of one with a "provable, sincere, dedicated, and established status."[151] Justice Blackmun considered the floodgates fear and reassuringly stated that the Court "need not fear that Pandora's Box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past."[152]

D. Standing for Inanimate Objects

The dissenting opinion of Justice Douglas fashioned a rather avant garde notion of standing which he believed should be brought to bear in the adjudication of environmental issues.[153] He would have allowed environmental issues to be litigated before the Court "in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.[154]

Douglas responded to the separation of powers issue posed by the Solicitor General by noting that the governmental agencies which are in-

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[147] *Quoted in* 405 U.S. at 740 n.16. The Court also referred to de Tocqueville's more famous observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." *Quoted in id.*

[148] *Id.* at 740.

[149] *Id.* at 753-55 (Appendix to opinion of Douglas, J., dissenting).

[150] *Id.* at 757 (Blackmun, J., dissenting).

[151] *Id.*

[152] *Id.* at 758.

[153] *Id.* at 741 (Douglas, J., dissenting). For further discussion of Justice Douglas' treatment of the concept of standing, see Mendelson, *Mr. Justice Douglas and Government by the Judiciary*, 38 J. POL. 918, 921-23 (1976); and Goldman, *In Defense of Justice: Some Thoughts on Reading Professor Mendelson's "Mr. Justice Douglas and Government by the Judiciary"*, 39 J. POL. 148, 152-53 (1977).

[154] 405 U.S. at 741 (Douglas, J., dissenting).

stituted to protect the 'public interest' are often "notoriously under the control of powerful interests who manipulate them,"[155] and "unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect."[156] The argument put forth by the Solicitor General that judicial review of administrative action is made unnecessary by the continuous and effective scrutiny of governmental agencies by Congress[157] was refuted by Douglas in his assertion that "even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often."[158]

E. Organizational Plaintiffs

The denial of standing to the plaintiff in *Sierra Club* for its failure to allege injury to its members was to some extent based upon the general principle against the assertion of third party rights. Justice Stewart inferred from the plaintiff organizations' failure to allege such injury that it must have "regarded any allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's long-standing concern with and expertise in such matters were sufficient to give it standing as a 'representative of public.' "[159] After stating that such a stance indicates a basic misunderstanding about the law concerning 'public actions,' Stewart explicated the relevant case law and proceeded to derive therefrom an articulate rule of standing for organizational plaintiffs:

> It is clear than an organization whose members are injured may represent those members in a proceeding for judicial review . . . But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA.[160]

According to Stewart, once an organizational plaintiff has properly alleged "injury in fact" of some or all of its members, standing is established and the plaintiff may then "assert the interests of the general public in support of his claims for equitable relief."[161] In other words, a litigant, whether organizational or individual, may properly represent the public interest only if the prerequisite of standing has first been satisfied by the allegation of "injury in fact." Stewart recognized the trend of the

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[155] *Id.* at 745.

[156] *Id.* at 747. *See also* Moss v. CAB, 430 F.2d 891, 893 (D.C. Cir. 1970).

[157] Sierra Club v. Morton, 405 U.S. at 753-55 (Appendix to opinion of Douglas, J., dissenting).

[158] *Id.* at 745 (Douglas, J., dissenting).

[159] *Id.* at 736 (opinion of Stewart, J.).

[160] *Id.* at 739.

[161] *Id.* at 740 n.15.

Administrative Procedure Act cases towards the broadening of the categories of injury, but he drew a firm distinction between this and the actual abandonment of the requirement of allegation of injury.

F. Jus Tertii - Assertion of Rights of Third Parties

The general principle that a litigant may not assert the constitutional or legislatively protected rights of third parties — jus tertii — has arisen as a rule of jucicial restraint. This development has been influenced by the inhibitory belief that "the assertion of rights not personal to the plaintiff prevents the framing of issues with sufficient adverseness."[162] According to the Court in *Craig v. Boren*, [163] this prohibitory principle is not constitutionally mandated, but rather stems from a "salutary rule of self-restraint designed to minimize unwarranted intervention into controversies where applicalbe constitutional questions are ill-defined and speculative."[164] Because this principle has ostensibly arisen without constitutional mandate, it has been possible for the Court to allow for certain exceptions in the area of public interest law. Indeed, the relaxation of the principle by the Court in recent years has led one commentator to declare that "the Court has allowed so many exceptions to its rule . . . that the rule seems honoured only in the breach," and that these numerous exceptions "lack a coherent pattern and leave the significance of the rule in doubt."[165]

Several Supreme Court cases which state the general principle against the assertion of *jus tertii*, only to allow an exception thereto, merit examination at this point. In *Barrows v. Jackson*,[166] a white defendant was sued for breach of a restrictive covenant which discriminated against blacks. Notwithstanding the general rule against the vicarious assertion of constitutional rights, the Court permitted the defendant to assert the equal protection rights of unidentified third party blacks.[167] The Court considered this relaxation of the rule to be justified by the fact that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court."[168]

The inability of a third party to assert his own rights was also found to be a ground for exception to the general rule in the 1958 case of *NAACP v. Alabama*.[169] In an action to oust the National Association for the Advancement of Colored People from the State of Alabama, the State

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[162] *See* Schaffner, *supra* note 29, at 950.

[163] 429 U.S. 190 (1976).

[164] *Id.* at 193.

[165] Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-24 (1974).

[166] 346 U.S. 249 (1953).

[167] *Id.* at 255-59.

[168] *Id.* at 257.

[169] 357 U.S. 449 (1958).

had obtained a court order requiring the Association to produce membership lists. Their refusal to comply resulted in a judgement of contempt, in response to which the Association petitioned to the Supreme Court for certiorari.[170] The Court reversed the judgement of contempt, holding that, because the members and the NAACP were "in every practical sense indentical" and because disclosure of the members identity would destroy their constitutional right to freedom of association, the NAACP was the appropriate party to vindicate that right.[171]

In *Griswold v. Connecticut*,[172] the executive and medical directors of a family planning association were charged under an anti-birth control statute with the offense of abetment. They were permitted standing to assert the constitutional right to privacy of married persons with whom they had a professional relationship of a "confidential" nature.[173] *Eisenstadt v. Baird*[174] also emphasized the nature of the relationship between the litigant and those whose rights he seeks to assert. In that case, a proponent of planned parenthood was convicted under a Massachusetts statute for unlawfully distributing contraceptive articles to unmarried persons.[175] On appeal, the Supreme Court held that although he was not a physician or a pharmacist or an unmarried person, the appellee had standing to assert the equal protection rights of unmarried persons who were denied access to contraceptives.[176]

The appellee's standing in *Eisenstadt* was in part based upon the fact that his relationship to the unmarried persons whose rights he sought to assert was essentially as between "one who acted to protect the rights of a minority and the minority itself."[177] Moreover, the Court's grant of *jus tertii* standing was based upon its determination of the impact of the legislation on third party interests and upon the fact that the third parties themselves had no forum in which to assert their own rights.[178]

Although this latter notion was also acknowledged as a basis for exception in *Broadrick v. Oklahoma*,[179] the Court there emphasized the significance of the basic rule against the vicarious assertion of rights. This inhibitory rule "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[180] The Court also indicated that excep-

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[170] *Id.* at 454.

[171] *Id.* at 459.

[172] 381 U.S. 479 (1965).

[173] *Id.* at 481.

[174] 405 U.S. 438 (1972).

[175] *Id.* at 440.

[176] *Id.* at 446.

[177] *Id.* at 445.

[178] Unmarried persons are not themselves subject to prosecution under the anti-birth control statute, which prohibited the distribution, not the use, of contraceptives. *Id.* at 446.

[179] 413 U.S. 601 (1973).

[180] *Id.* at 610-11.

tions are to be recognized only in situations involving the most "weighty countervailing policies."[181]

In *Singleton v. Wulff*,[182] a case which involved delicate policy issues,[183] the Court clearly outlined two factual elements which justified a departure from the general rule. Firstly, the existence of a relationship between the litigant and the persons whose rights he seeks to assert is relevant to the Court's determination on *jus tertii* standing if the enjoyment of those rights is "inextricably bound up with the activity which the litigant seeks to pursue."[184] The litigants in *Singleton* were physicians who sought to assert the *jus tertii* rights of their female patients in a challenge to the constitutionality of a Missouri statute which deprived needy persons of Medicaid benefits for non-medically indicated abortions.[185]

The second relevant factual element in *Singleton* was the ability of the third party to assert his own rights. Finding firstly that the requisite closeness was patent in the doctor-patient relationship and, secondly, that because of emotional and practical obstacles, the women's assertion of their own rights was inhibited, the Court permitted the litigants to vicariously assert the rights of their patients.[186] It is important to note, however, that the litigants in *Singleton* were in a position to be able to allege a sufficiently concrete interest of their own - an economical interest - in the outcome of the suit to establish the constitutional requirements of article III. Without such an allegation, it is likely that a threshold determination regarding the standing of the litigants would not have been made in their favour.

The bifurcated exception set forth in *Singleton* was amplified in the decision of *Craig v. Boren*,[187] wherein the Court permitted a female licensed vendor of beer to assert the equal protection rights of males 18 to 20 years of age in her challenge to an Oklahoma statute which prohibited the sale of beer to males under the age of 21 and females under the age of 18.[188] As in *Singleton*, the litigant was independently able to establish her

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[181] *Id.* at 611. *See* United States v. Raines, 362 U.S. 17 (1960). In *Broadrick*, the Court considered the infringement of First Amendment rights to present such a situation.

[182] 428 U.S. 106 (1976).

[183] The Court approved and applied the distinctions articulated in Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Doe v. Bolton, 410 U.S. 179 (1972), all of which emphasized the nature of the third party litigant relationship.

[184] Singleton v. Wulff, 428 U.S. at 114.

[185] *Id.* at 109.

[186] *Id.* at 117. The Court noted that a woman "may be chilled from such assertion by a desire to protect the very privacy of her decisions from the publicity of a Court suit." *Id.* The more practical obstacle to such assertion was the problem of "imminent mootness", i.e. only a few months after a woman makes a decision to abort, she will lose her right to do so by the very lapse of time which would inevitably elapse in the course of a court action. *Id.*

[187] 429 U.S. 190 (1976).

[188] *Id.* at 192-93.

standing, for the impugned statute allegedly inflicted "injury in fact" upon her sufficient to guarantee "concrete adverseness" and to satisfy the requirements of article III.[189] The Court permitted the assertion of the "concomitant rights" of the third parties in the challenge to the constitutionality of the statute, holding that these rights "would be diluted or adversely affected should the constitutional challenge fail and the statute remain in force."[190]

In *Warth v. Seldin*,[191] the Court applied the *Sierra Club* reasoning regarding representational standing. The Court held that even in the absence of injury to itself, an association may have standing solely as the representative of its members, but only if it first alleges that some or all of its members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit," and only if the individual participation of each injured member would not be indispensible to a proper judicial resolution of the action.[192] The Court also declared that an association may, in alleging injury to itself, assert the rights of its members if their associational ties are adversely affected by the impugned action.[193] Furthermore, the nature of the relief sought was indicated by the Court to be a relevant consideration in the determination of the standing of a representative plaintiff. That is to say, the Court will be highly influenced by the extent to which the relief sought will arguably inure to the benefit of the members of the association who are actually injured.

The *Warth* exception to the rule against *jus tertii*[194] was approved and amplified in a subsequent 1977 decision, *Hunt v. Washington Apple Advertising Commission*,[195] where it was held by the Court that an association has standing to vindicate the rights of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[196]

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[189] *Id.* at 194.

[190] *Id.* at 195.

[191] 422 U.S. 490 (1975). See text accompanying notes 237-49, *infra*.

[192] 422 U.S. at 511. The Court also held that there was "no doubt that an association may have standing in its own right to seek judicial review from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.*

[193] *Id.*

[194] *Id.* at 511. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), which, in considering the *Warth* exception, found that the plaintiff organization did not have representational standing as it had been unable to assert either injury to itself or "actual injury" to any of its members.

[195] 432 U.S. 333 (1977).

[196] *Id.* at 343. In *Hunt*, the WAAC was actually attempting to assert the rights of persons who were not actually "members" of the Commission in the traditional sense. The Court nevertheless granted representational standing on the finding that these persons possessed all the "indicia" of membership in an organization and that, in any event, the Com-

G. *A Re-examination of Standing by the Burger Court*

The general approach of the Court to the concept of standing in the several years following the *Flast* decision demonstrated a willingness to facilitate judicial access for private litigants who were seeking to vindicate public rights. These years have been referred to as the Warren Court's "activist" years.[197] While the Court continued to apply the constitutional "personal stake" test, which required the establishment of either "logical nexus" or "injury in fact,"[198] some cases extended "logical nexus" to a mere connection between the status asserted and the claim sought to be adjudicated[199] and others stretched "injury in fact" to include abstract allegations beyond substantiation.[200] In 1971, a Federal Court of Appeals judge commented that "the Supreme Court's recent decisions have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality."[201]

The more recent trend, however, has become one of restraint. The present Burger Court has restrictively redefined standing to the extent that non-traditional litigants seeking to assert the public interest are virtually barred from the courts. The juncture to which this reversal of trends is likely attributable was the fresh consideration by the Court of the notion of taxpayer or citizen standing *per se* in two 1974 companion cases involving highly controversial issues of public policy, *United States v. Richardson*[202] and *Schlesinger v. Reservists Committee to Stop the War*.[203]

In *United States v. Richardson*, a federal taxpayer insituted an action to challenge the constitutionality of certain provisions of the Central Intelligency Agency Act[204] which concern the public reporting of expenditures. He alleged that the withholding of such information as provided for

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mission itself stood to be adversely affected financially by the outcome of the litigation, thereby establishing the "personal stake" requirement. *Id.* at 344-45.

[197] Note, *Standing and the Propriety of Judicial Intervention Reviving a Traditional Approach*, *supra* note 131, at 945.

[198] *See, e.g.*, Barlow v. Collins, 397 U.S. 159 (1970).

[199] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[200] *See, e.g.*, United States v. S.C.R.A.P., 412 U.S. 669 (1973), where standing was accorded to users of a recreational area challenging an Interstate Commerce Commission order which permitted railroads to impose a surcharge on freight rates for certain items including, among other things, recycable materials. The plaintiffs had alleged that the surcharge would increase the use of nonrecyclable commodities, leading in turn to a greater use of virgin materials and to a disruption in their use of the forests, streams and other resources in a certain area for camping, fishing, hiking and sightseeing. *Id.* at 678. It was held by the Court that the fact that many persons share the same injury was not sufficient reason to deny standing. *Id.* at 686-87.

[201] National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 693 (D.C. Cir. 1971).

[202] 418 U.S. 166 (1974).

[203] 418 U.S. 208 (1974).

[204] 50 U.S.C. §403a *et seq.* (1976).

by the legislation constituted a violation of the Statement and Account Clause of the Constitution.[205]

The *Richardson* Court was forced to acknowledge the *Flast* modification of the *Frothingham* doctrine, but it applied the same in a fashion which strictly limited its purview so as to effectively preclude the *Richardson* action and any future taxpayer suits which did not precisely fit into the *Flast* situation. The logical nexus test, the satisfaction of which had imputed standing to the taxpayer/plaintiff in *Flast*, was held by the *Richardson* Court to be applicable only to challenges addressed to the taxing or spending power of Congress under article I, section 8 of the Constitution and to challenges which allege a violation of a specific constitutional limitation upon the said power.[206] The plaintiffs did not directly attack the exercise of the taxing and spending power,[207] and thus were unable to allege the appropriate nexus. As a result, they were seen by the Court as "improperly seeking to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government."[208]

To invoke judicial powers of review, the Court in *Richardson* held it necessary for the prospective plaintiff to meet the *Flast* personal stake prerequisite by the satisfaction of the logical nexus test or, in the alternative, by the allegation of "injury in fact" in the sense of a "direct, concrete injury."[209] As the *Richardson* plaintiff was alleging what the Court saw as a mere "abstract injury" and were essentially seeking to advocate a general interest common to all citizens, they were found not to have satisfied the personal stake test for case or controversy.[210]

The inhibitory notion of separation of powers was most prevalent in the *Richardson* decision. In delivering the majority opinion, Chief Justice Burger exhibited a judicial unwillingness to adjudicate a claim which involved a potential collision between the judiciary and the other two

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[205] 418 U.S. at 167-68. U. S. CONST. art. I, §9, cl. 7 provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time."

[206] 418 U.S. at 175.

[207] As pointed out by Douglas in his dissent, a taxpayer cannot possibly challenge the exercise of the taxing and spending power unless he knows how the money is being spent. He cannot possibly know how the money is being spent unless there is a public reporting of expenditures as provided for by the Statement and Account Clause. By confining standing to a narrowly applied logical nexus test, the Court has thereby created a "Catch-22" situation. *Id.* at 201 (Douglas, J., dissenting).

Justice Powell, while concurring with the majority opinion, indicates that he would obliterate the *Flast* nexus test, for it "has no meaningful connection with the Court's statement of the bare-minimum constitutional requirements for standing." *Id.* at 181 (Powell, J., concurring).

[208] *Id.* at 173 (opinion of Burger, C.J.).

[209] *Id.* at 175, 179-80.

[210] *Id.* at 176-80.

branches of government. Burger saw the interests which serve to motivate such a claim as best vindicated in the political forum or at the polls. In stressing that the U.S. Constitution created a representative and responsible government, Burger asserted that lack of standing does not impair the right of a citizen to make known his views. He acknowledged the fact that the traditional electoral process may seem to be "[s]low, cumbersome, and unresponsive" and that the trend has therefore been for citizens to increasingly request judicial intervention, but insisted nevertheless that the American governmental system provides for citizen complaint by facilitating the replacement of one government by another at the behest of the majority of the electorate.[211]

The concurring opinion of Justice Powell echoed the same separation of powers concerns. In his words, "[r]elaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."[212] He feared that such unrestrained standing would lead to a system of judicial supervision of the co-ordinate branches of government similar in kind to the proposed Council of Revision which was repeatedly rejected by the framers of the Constitution.[213]

In addition, Powell was concerned about the burden upon the limited resources of the Court which would only be exacerbated by the diversion of the Court's attention "from [its] historical role to the resolution of the Court's public interest suits."[214] He noted "how often and how unequivocally the Court has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government."[215]

Richardson's companion case, *Schlesinger v. Reservists Committee to Stop the War*,[216] was also an attempt by citizens to advocate the public

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[211] *Id.* at 179.

[212] *Id.* at 188 (Powell, J., concurring).

[213] *Id.* at 189. The Council of Revision was part of the plan for the Constitution proposed by Governor Randolph of Virginia. According to the Randolph Plan:

> The Executive and a convenient number of the National Judiciary, ought to compose a Council of Revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that a particular Legislature be again negatived by 5 rules of the members of each branch.

Reprinted in 1 THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 61 (L.H. Pollak ed. 1966).

[214] 418 U.S. at 192.

[215] *Id.*; *see, e.g.*, Ex parte Levitt, 302 U.S. 633 (1937); Massachusetts v. Mellon (Frothingham), 262 U.S. 447, 448 (1923).

[216] 418 U.S. 208 (1974).

interest *per se* without alleging jnjury beyond that suffered by all other citizens and taxpayers. A group of anti-war citizens and taxpayers brought suit to challenge a governmental policy, which permitted members of Congress to hold positions in the Armed Forces Reserves, as being an unconstitutional violation of article I, section 6, clause 2, which provides that no person "holding any Office under the United States" shall be a member of Congress during his continuance of such office.[217] The complaint alleged injury "to the ability of the average citizen to make his political advocacy effective whenever it touches on the vast interests of the Pentagon."[218] The Court in *Schlesinger* viewed the alleged injury as abstract in nature, referable only to a "generalized interest of all citizens in constitutional government," an insufficient basis for standing.[219] This was clearly expressed by Chief Justice Burger, in speaking for the majority:

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."[220]

The three inhibitory notions which have served to restrain judicial intervention into public interest controversies plainly influenced the Court in its denial of standing. As in *Richardson*, the Court in *Schlesinger* felt confident in being able to avoid the adverse consequences of ignoring these inhibitions only by the strict requirement of allegation of concrete injury. Ostensibly, the separation of powers doctrine and the adversarial proceedings limitation would not be flouted, nor would the floodgates fear be disregarded if all prospective litigants were required to justify their standing by establishing that they have suffered direct, concrete injury.

In expressing the hesitancy of the Court to undertake any constitutional adjudication, Burger indicated that the practical effect of judicial intervention in *Schlesinger* would be to bring about a "confrontation with one of the coordinate branches of the Government."[221] He believed that the requirement of concrete injury serves the proper function of "insuring that [constitutional] adjudication does not take place unnecessarily."[222] Although Burger acknowledged that all citizens share an equal interest in the independence of each branch of government, he viewed such an interest as being "too abstract to constitute a 'case or controversy' appropriate

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[217] *Id.* at 210-11; U.S. CONST. art. I, §6, cl. 2.
[218] 418 U.S. at 233 (Douglas, J., dissenting).
[219] *Id.* at 227 (opinion of Burger, C.J.).
[220] *Id.* at 222.
[221] *Id.*
[222] *Id.* at 221.

for judicial resolution."[223]

As in *Richardson*, the constitutional "case or controversy" requirement of personal stake, as articulated by *Flast*, was restrictively applied in *Schlesinger*. According to Burger, this requirement may be met either by the satisfaction of the *Flast* logical nexus test or by the allegation of direct, concrete injury. The nexus test was found not to be satisfied by the *Schlesinger* plaintiffs as no challenge to Congress' taxing and spending power was made.[224]

A personal stake constituted by concrete injury is described by Burger in *Schlesinger* as an "indispensable element" in the type of dispute traditionally seen as capable of judicial resolution.[225] Burger espoused the belief that only such a personal stake on the part of the complainant will assure a full and authoritative presentation to the Court of the adverse consequences flowing from the challenged action:

> Such authoritative presentations are an integral part of the judicial process, for a Court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[226]

The *Schlesinger* Court seemed generally disinclined to make a constitutional ruling on what it considered abstract issues which would, by *res judicata*, effectively preclude prospective plaintiffs from present issues arising out of concrete injury. If only those persons directly so injured are permitted to broach relevant issues for judicial consideration, the *res judicata* effect will likely be more limited:

> the discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied.[227]

The motivation of the complainants, no matter how bona fide, was seen by the Court as an improper substitute for "injury in fact." In fact, the "essence" of standing was held to be "not a question of motivation but of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct."[228]

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[223] *Id.*

[224] *Id.* at 228.

[225] *Id.* at 220-21.

[226] *Id.* at 221.

[227] *Id.* at 222. *But see* Jaffe, *supra* note 2, at 1034, who suggests that a widespread desire for a broad judicial pronouncement is not irrelevant to the definition of the judicial function.

[228] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. at 225-26; In the words of Chief Justice Burger:

> actual injury [is] needed by the courts and adversaries to focus litigation efforts and judicial decisionmaking. Moreover, the evaluation of the quality of the presentation on the merits was a retrospective judgment that could properly have been arrived at only after standing had been found so as to permit the court to consider the merits. A logical corollary to this approach would be the manifestly

The floodgates fear was placated in *Shclesinger* not merely by the denial of standing, but by the inclusion by the Court of the following statement, which is exemplary of the perfunctory mention usually made of the limited resources of the Court:

> The powers of the federal judiciary will be adequate for great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.[229]

Although it was implicit in the *Flast* decision that taxpayers or citizens seeking to obtain judicial review of a justiciable constitutional question should be granted standing when no other plaintiffs are available, Burger clearly is not in favour of such an approach. In *Schlesinger*, he asserted that the American system of government has left certain crucial decisions to the other branches of government and that a plaintiff should not be found to have standing simply because the effect of denying standing to the plaintiff might be to preclude any other plaintiffs from litigating the same issue. In *Richardson*, he argued that the absence of any plaintiff other than a citizen or taxpayer to challenge impugned action is indicative of the political nature of the issue and hence the impropriety of judicial intervention.[230]

The dissenting opinions of Justices Douglas and Marshall in *Schlesinger* do not disagree so much with the adoption of interpretation of "personal stake" as requiring direct, concrete injury as with the characterization of the plaintiffs' alleged injury as abstract. Marshall described the plaintiffs' complaint as "a claim of direct and concrete injury to a judicially cognizable interest."[231] Douglas asserted that a fundamental tenet of the American democratic system decrees that "the people, not the bureaucracy, are the sovereign."[232] Consequently, he considered that the interest of citizens in having the Constitution enforced as it is written is a basic right. The abrogation of this right, said Douglas, is more than a generalized grievance, even though the resultant injury is common to all citizens.[233]

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untenable view that the inadequacy of the presentation on the merits would be an appropriate basis for denying standing.

Id. at 226. *See also* Doremus v. Board of Education, 342 U.S. 429 (1952).

[229] 418 U.S. at 222, quoting Flast v. Cohen, 392 U.S. 83 (1968) (Harlan, J., dissenting).

[230] *See* Tushnet, *supra* note 8, at 692.

[231] 418 U.S. at 239 (Marshall, J., dissenting).

[232] *Id.* at 232 (Douglas, J., dissenting).

[233] *Id.* at 232-33. According to Justice Douglas:

> The interest of citizens is obvious. The complaint alleges injuries to the ability of the average citizen to make his political advocacy effective whenever it touches on the vast interests of the Pentagon. It is said that all who oppose the expansion of military influence in our national affairs find they are met with a powerful lobby—the Reserve Officers Association—which has strong congressional allies.

Id. at 233.

Douglas referred to the statement in *S.C.R.A.P.*[234] that "standing is not to be denied simply because many people suffer the same injury."[235] The floodgates fear was diminished in Douglas' eyes by what he saw as the odiousness of a "no other plaintiff" consequence: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[236]

The Court made the standing prerequisites even more stringent in two subsequent public interest actions, *Warth v. Seldin*[237] and *Simon v. Eastern Kentucky Welfare Rights Organization.*[238] In *Warth*, a suit was brought on behalf of minority and low income persons challenging the constitutionality of a suburban town's zoning ordinance which allegedly was enacted to exclude such persons from living within its perimeters.[239] It was held by the Court, *inter alia*, that the plaintiffs did not have standing since they had not adequately indicated in their pleadings that the allegedly unconstitutional zoning ordinance had demonstrably caused their exclusion from residence in the town.[240] In embarking upon a line of causation analysis, the Court observed that while the zoning ordinance may have acted to increase the cost of housing within the town, the inability of the plaintiffs to find housing was the consequence of the economics of the area housing market rather than of the allegedly unconstitutional ordinance.[241]

Notwithstanding its assertion that a resolution as to standing must be a threshold determinant which should not depend upon the merits of the complaint, the Court in *Warth* actually engaged in a premature examination of the merits by analysing the lines of causation between the injury alleged and the action complained of.

In its discussion of the question of standing, the Court recognized that judicial intervention can be inhibited by both constitutional limitations on Court jurisdiction and "prudential limitations on its exercise."[242] The underlying concern for both inhibitions was the desire to maintain the "proper - and properly limited - role of the courts in a democratic

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[234] United States v. S.C.R.A.P., 412 U.S. 669 (1973).

[235] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. at 235 (Douglas, J., dissenting).

[236] *Id.* Justice Stewart, in his concurring opinion, saw no inconsistency with *S.C.R.A.P.* in the denial of standing to the plaintiffs. He explained that standing was denied not because the alleged injury had been suffered by many but rather because "the sort of direct palpable injury required for standing under Article III" had not been alleged. *Id.* at 229 (Stewart, J., concurring).

[237] 422 U.S. 490 (1975).

[238] 426 U.S. 26 (1976).

[239] 422 U.S. at 493.

[240] *Id.* at 508.

[241] *Id.* at 506.

[242] *Id.* at 498.

society."[243]

In *Simon v. EKWRO*,[244] the Court further indicated its intention to look partially into the merits of a claim to determine standing by requiring the establishment by the complainant of injury that "fairly can be traced to the challenged action of the defendant."[245] The plaintiff organizations in *Simon* were challenging an Internal Revenue Service ruling which made it financially practicable for nonprofit hospitals to avoid providing health care for low income persons.[246]

Justice Powell, speaking for the majority, held that the plaintiffs lacked standing not just because of the failure to allege a causal link between the asserted injury and action of the defendants, but because their claim did not indicate that the prospective relief would alleviate the harm.[247] This latter notion was also apparent in the *Warth* decision when the Court suggested that in a proper case the remedy, if granted, should inure to the benefit of those actually injured.[248]

According to earlier characterizations by the Court of the standing concept, one would think that such considerations, especially a causal link analysis, belong more properly to a determination by the Court of the merits. The Court repeatedly has asserted that standing is a threshold determinant, that standing focuses on the party and not the issues, and that standing is only one aspect of justiciability. Yet the Court appeared in cases such as *Warth* and *Simon* to be avoiding its own directives by leaping over the threshold of the door of the Court for a premature perusal of the merits. Such judicial behavior leads to the conjecture that the Court is manipulating the standing determinant as a surrogate for a decision on the merits when, for whatever reason, the Court wishes to disguise such a decision.[249]

III. The Concept Of Standing As Applied By The Canadian Court

The treatment of the concept of standing by Canadian courts, until very recently, has closely paralleled American trends. This parallel treatment is surprising in light of fundamental constitutional distinctions in regard to the function of the judiciary. Canadian courts are unhampered

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[243] *Id.*

[244] Simon v. Eastern Ky. Welfare Rights Orgs., 426 U.S. 26 (1976).

[245] *Id.* at 41 (opinion of Powell, J.).

[246] *Id.* at 32-33.

[247] *Id.* at 45-46.

[248] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), where the Court accorded standing to an organizational plaintiff challenging the zoning policies of the defendant village. Unlike the organizational plaintiff in *Warth*, however, the plaintiff in *Arlington Heights* was able to allege specific injury that was "fairly traceable to the defendant's acts or ommissions." *Id.* at 261. The plaintiff's planned housing development was cancelled by the defendant village's refusal to rezone a single-family dwelling area. *Id.* at 254.

[249] *See generally*, Tushnet, *supra* note 8, at 663-64, 699-700.

by such constitutional constraints as the "case or controversy" requirements of article III of the United States Constitution[250] and therefore any inhibitory notions of separation of powers or adversarial proceedings have no doctrinal basis. Moreover, what would be perceived by American constitutional lawyers as non-judicial advisory functions have long been seen as being within the proper territory of the Supreme Court of Canada in its consideration of references.[251] Yet, notwithstanding this relative freedom from constitutional restraint, the tendency of the Court in public interest suits, until recently,[252] has been to restrict standing to those litigants who have properly asserted an interest or an injury peculiar to themselves.

The Canadian Court, like its American counterpart, tends to manipulate standing as a gauge for the consideration of the appropriateness of judicial intervention and in so doing tends to apply the same inhibitory notions discussed above. In the absence of constitutional limitations upon the function of the Court, however, there is no absolute preclusion from intervention and therefore the inhibitory notions regarding the role and the power of the Court are less predominant. It is the third inhibition, the floodgates fear, which is the most pervasive concern.

In *Smith v. Attorney-General of Ontario*,[253] the first definitive Canadian pronouncement on the question of standing, this concern about the multiplicity of proceedings predominated the reasoning of the Court in its decision to deny standing.

As in *Frothingham*,[254] the prospective plaintiff in *Smith* attacked a regulatory piece of legislation, grounding his standing on the assertion of his status as taxpayer. The facts of the case disclose that at a time when the importation of liquor into Ontario was prohibited, Smith, a resident of the province, attempted to place an order for a certain quantity of alcoholic beverages from a dealer in another province. Aware of the fact that the Canada Temperance Act prohibited such importation into Ontario, the dealer declined to accept the order. Smith commenced his action against the Attorney-General of Ontario, seeking a declaratory judgement to effect that the prohibitory statute did not validly apply in his prov-

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[250] U.S. CONST. art. III, §2, cl. 1.

[251] The reference is a device whereby the legislative branch of the government can refer questions of law to the Court for an advisory opinion. While not specifically restricted to the consideration of constitutional issues, this has been the predominant use of the reference procedure. In fact, the reference procedure has been the device utilized to bring to court approximately one-third of all Canadian constitutional cases. *See* G. STRAYER, *supra* note 21, at 111-23.

[252] In the exercise of what has been described as "creative decision-making," the Court articulated standing requirements which appeared to liberalize the former treatment of the concept. *See* Thorson v. Attorney Gen. of Can., 43 D.L.R.3d 1 (Can. 1974).

[253] [1924] 3 D.L.R. 189 (Can.).

[254] Massachusetts v. Mellon (Frothingham), 262 U.S. 447 (1923). It is interesting to note that *Smith* was decided just one year after *Frothingham* and that both cases stood for over 45 years as effective barriers to the standing of public interest litigants.

ince.[255] He attempted to base his standing on the fact that the effect of the statute was to debar him from exercising his right to bring liquor into the province and that he should not have to place himself in the intolerable position of subjecting himself to criminal prosecution in order to challenge legislation which so affected him.[256]

Smith based this argument on the decision of the English Court of Appeal in *Dyson v. Attorney-General.*[257] In *Dyson*, the plaintiff also sought to challenge illegal governmental action without putting himself first in the vulnerable position of prosecution. The Court decided to hear the plaintiff on his complaint, notwithstanding the fact that he had not suffered any particular injury and did not wish to assert any particular interest beyond that of the public in general. Lord Justice Fletcher-Moulton asserted in *Dyson* that the English judicial system "would never permit a plaintiff to be 'driven from the judgement seat' . . . without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."[258] Similar sentiment was expressed by Lord Justice Farwell who declared: "it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power in question can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty."[259]

Although the Court in *Smith* appeared to be moved by the plaintiff's argument that he should not have to subject himself to criminal prosecution in order to challenge legislation which directly affected him, it was more concerned about the "grave inconvenience" which could result from the recognition of a principle which would allow virtual "citizen standing."[260] In the words of Justice Duff:

> Much may be said no doubt for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts, imposing constraint upon him in his daily conduct, which, on the grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a Province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a

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[255] [1924] 3 D.L.R. at 189.

[256] *Id.* at 191.

[257] [1911] 1 K.B. 410 (C.A.).

[258] *Id.* at 419.

[259] *Id.* at 421.

[260] [1924] 3 D.L.R. at 193.

similar way in his business or in his personal life.[261]

This same *ab convenienti* argument had been put forth on behalf of the Attorney-General in *Dyson*. The House of Lords, however, quickly dismissed the fear of consequential "innumerable actions" by indicating the ultimate influence which the court can bring to bear in curtailing the flow of such proceedings. Firstly, it is within the discretion of the Court to refuse to make declaratory orders such as that requested by the plaintiff in *Dyson*. Secondly, it is appropriate for the court to punish with costs those plaintiffs who bring unnecessary actions. In so countering the inconvenience argument in *Dyson*, Lord Justice Farwell balanced the floodgates fear against the public interest in judicial intervention:

> [t]here is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the inconvenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments, and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any court.[262]

The *Smith* Court, however, more fearful than was Lord Justice Farwell of the multiplicity of proceedings which might arise as a consequence of according standing to a public interest litigant, chose to distinguish *Dyson*.[263] It held that *Smith* involved a decision upon a hypothetical set of facts, while *Dyson* involved an official demand which was an illegal attempt to constrain the plaintiff personally by an illegal threat addressed to him as an individual.[264] In finding that the plaintiff had been neither specially affected nor exceptionally prejudiced by the challenged legislative action, the *Smith* Court held that he had no status or standing to bring his action.[265] It then curiously proceeded to also rule on the merits, stating, "we are loath to give a judgement against the appellant solely based upon a fairly disputable point of procedure; and accordingly, we think it right to say that in our opinion the appellant's action also fails in substance."[266]

A closer look at *Smith* reveals that the Court was willing and eager to adjudicate upon the substantive issues raised and yet it feared that to do so would create a dangerous precedent for the laws of standing. Thus, it proceeded to decide upon the merits while asserting that the plaintiff had not established standing sufficient to satisfy the requirements of a deci-

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[261] *Id.*
[262] [1911] 1 K.B. at 423.
[263] Smith v. Attorney Gen. of Ont., [1924] 3 D.L.R. at 190.
[264] *Id.* at 192.
[265] *Id.* at 193-94.
[266] *Id.* at 194.

sion on the merits. This contorted form of legal analysis would likely never be found in a decision of the American Court where standing is usually characterized as a threshold determinant. The American Court, however, occasionally engages in the more clandestine practice of using the determination on standing to disguise what is in fact a decision on the merits.[267]

Until 1974,[268] the *Smith* pronouncement on standing was viewed as having bolted the door of the Court to the airing of public interest issues. The "exceptionally prejudiced" requirement effectively meant that any legislation or official action which affected all members of the public alike, albeit adversely, could not be challenged by individuals in the courts. Only individuals who were asserting an essentially private right could satisfy the standing requirement laid down by *Smith*. Public rights as such could only be vindicated in the courts at the behest of the Attorney-General, the recognized "guardian" of the public interest.[269]

A. The Role of the Attorney-General and the Extent of his Discretion

As chief law officer of the Crown, the Attorney-General derives his role as legal representative of the public interest from the Crown's prerogative rights as *parens patriae*. Action may be brought in the name of the Attorney-General to redress infringement of public rights either *ex proprio motu*, i.e. on his own intitative or based upon information received from a member of the public, or *ex relatione*, i.e., where the Attorney-General permits the use of his name "on the relation of" an individual bringing an action.[270]

Prior to either the instituting of an *ex proprio motu* action or consenting to an *ex relatione* action, it is the responsibility of the Attorney-General to weigh all relevant factors to determine whether the prospective actions would indeed be in the public interest.[271] Although he is a member of the government in power and a political appointee, "it is a matter of clear constitutional doctrine that in the exercise of his discretion in this matter the Attorney-General has the duty to represent the public interest with complete objectivity and detachment."[272] Yet the exercise of the Attorney-General's discretion is generally held to be absolute, subject only to his general accountability to Parliament.[273]

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[267] *See generally*, Tushnet, *supra* note 8, at 663-64, 699-700.

[268] *See* Thorson v. Attorney Gen. of Can., 43 D.L.R.3d 1 (Can. 1974).

[269] *See* Loggie v. Town of Chatham, [1928] 2 D.L.R. 583 (App. Div., N.B.); Jenkins v. Winnipeg, [1941] 1 D.L.R. 477 (K.B., Man.).

[270] *See* Comment, *Right of Private Citizen to Litigate Questions Involving Public Interest*, 56 CAN. B. REV. 331, 333 (1978).

[271] *See generally* Note, *Locus Standi*, 12 U. BRIT. COLUM. L. REV. 320, 323 *et. seq.* (1978).

[272] Jolowicz, *Some Twentieth Century Developments in Anglo-American Civil Procedure*, 7 ANGLO-AM. L. REV. 163, 208 (1978).

[273] *See* J. EDWARDS, THE OFFICERS OF THE CROWN 289 (1964).

On the whole, the courts have shrunk from questioning what is seen as the "unfettered discretion"[274] exercised by the Attorney-General in his decision as to whether to initiate or consent to proceedings to vindicate the public interest. This reticence is clearly expressed as a constitutional principle by the Earl of Halsbury, L.C., in his delivery of the judgement of the House of Lords in *London County Council v. Attorney-General*:

> [t]he initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.[275]

The application of this principle by the Canadian courts has perpetuated the notion of the "untouchability" of the Attorney-General's discretion in public interest matters and the above reasoning of the Earl of Halsbury has been consistently cited with approval in cases in which the exercise of this discretion has been in issue. In *Grant v. St. Lawrence Seaway Authority*,[276] the principle was extended to disallow the plaintiff's attempted joinder of the Attorney-General as a defendant to a public action for his refusal to consent to public interest proceedings.[277]

1. The English Rule Against Interference

The question of the extent to which the Attorney-General's discretionary refusal to consent to proceedings should be a controlling factor in relation to the standing of a public interest litigant has been the subject of some debate in recent English decisions.[278] In *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority*,[279] the Court of Appeal appeared to be asserting that the Attorney-General does not have a monopoly on public interest representation and that his refusal to consent to proceedings might in certain circumstances not be determinative of a litigant's standing. While acknowledging the absolute nature of the Attorney-General's discretion as articulated in *London County Council*,[280] Lord Denning, rendering the majority opinion in *McWhirter*, indi-

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[274] Cowan v. Canadian Broadcasting Co., 56 D.L.R.2d 578 (Ct. App. Ont. 1966).

[275] [1902] A.C. 165, 169 (H.L.).

[276] 23 D.L.R.2d 252 (Ct. App. Ont. 1960).

[277] *Id.* at 257:

> the Attorney-General is not to be interfered with by the Courts in the exercise of his discretion not to institute proceedings when requested to do so by some member of the public. To seek to add him as a defendant in an action such as this which he has refused to institute, is nothing more or less than an attempt to flout the exercise of the discretion vested in him to regularize a proceeding which by its nature has no status in our Courts.

[278] *See generally* LORD DENNING, THE DISCIPLINE OF LAW 113 *et seq. (1979).*

[279] [1973] 1 All E.R. 689 (C.A.).

[280] [1902] A.C. at 169.

cated that in cases of extreme exigency where no other remedy is available, a plaintiff should be permitted to present his case before the court without being forestalled by the fact that the Attorney-General has refused his consent. In the course of his analysis, the Master of the Rolls declared:

> [i]f the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself. . . . I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced. But this, I would emphasize, is only the last resort when there is no other remedy reasonably available to secure that the law is obeyed.[281]

The suggestion that the appropriate avenue of complaint should be through another branch of government, via the Minister or via the plaintiff's member of Parliament, was dismissed by Denning in short order: "They are not so accessible. They are not so speedy or effective. They are not so independent as the courts of law."[282]

Lord Justice Cairns, in disagreement with Denning, saw the Attorney-General as the only plaintiff in a proper position to sue on behalf of the public as a whole, and chose not to interfere with the discretion of the Attorney-General, once exercised. He described the requirement of the Attorney-General's consent as a "useful safeguard against merely cranky proceedings and against a multiplicity of proceedings," and asserted that the "risk of damage to the public interest" in withholding that consent was far less serious than overriding the Attorney-General's discretion to withhold the same by the Court.[283] In contrast, any concern wih Denning might have had about the multiplicity of proceedings was diminished by his expressed horror at the image of injuriously affected plaintiff, albeit suffering no differently from thousands of others, who is debarred from the courts by the refusal of the Attorney-General to act.[284]

The "high constitutional principle" expressed by Denning in *McWhirter*[285] did not find favour with the House of Lords in the later deci-

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[281] [1973] 1 All E.R. at 698-99. Although Lord Denning expressly declined from restricting the circumstances in which an individual may be held to have a "sufficient interest," he refers with approval to the *Blackburn* line of cases in which the plaintiffs were held to have a "sufficient interest" even though shared with thousands of others. *Id.*

[282] *Id.* at 699.

[283] *Id.* at 703.

[284] *Id.* at 698-99 (Denning, M.R.).

[285] *Id.*

sion of *Gouriet v. Union of Post Office Workers*,[286] where the majority judgement stated that only the Attorney-General could assert public rights.[287] Not only was Denning's "high constitutional principle" — as repeated in his adjudication of *Gouriet* in the court below — rejected,[288] but the entire Appeal Court judgement was criticized as being tainted by "some confusion and an unaccustomed degree of rhetoric."[289] It is not expedient, within the context of this article, to consider in detail the complexities of the *Gouriet* decision, which, in any event, has been more than adequately done elsewhere.[290] Cetain aspects of the case, however, are relevant to the present examination of standing as it is influenced by various inhibitory notions of judicial restraint.

The inhibitory notion which would limit the role of the court to strictly adversarial proceedings which are traditionally regarded as capable of judicial resolution is apparent in Lord Diplock's judgement in *Gouriet*, where he asserted that "the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."[291]

Lord Edmund-Davies, who was somewhat critical of the Attorney-General for his refusal to act on behalf of the plaintiff, considered in his judgment the floodgates fear as a reason advanced on behalf of the Attorney-General for his refusal. Edmund-Davies was not moved by the argument that if public interest claims were consented to, the consequence would be the opening of "the 'floodgates' to a multiplicy of claims by busy-bodies," suggesting that there is no reason why such claims should become more profuse than the present number of private prosecutions in criminal courts which are "few and far between."[292]

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[286] [1977] 3 All E.R. 70 (H.L.), *rev'g* [1977] 1 All E.R. 696 (C.A.).

[287] *See* Note, Locus Standi, 12 U. Brit. Colum. L. Rev. 320, 334 (1978).

[288] This principle, enunciated by Lord Denning in Attorney Gen. ex rel. McWhirter v. Independent Broadcasting Auth., [1973] 1 All E.R. at 698-99, and repeated by him in the court below, Gouriet v. Union of Post Office Workers, [1977] 1 All E.R. at 703, was treated as mere dicta by the House of Lords since the Attorney General had ultimately consented to relator proceedings in *McWhirter*. Gouriet v. Union of Post Office Workers, [1977] 3 All E.R. at 85 (Wilberforce, L.J.).

[289] [1977] 3 All E.R. at 95 (H.L.).

[290] *See, e.g.*, Comment, *supra* note 270, at 338-45; Note, *supra* note 271, at 328-38.

[291] [1977] 3 All E.R. at 100 (Diplock, L.J.). As further stated by Lord Justice Diplock:

> The only kind of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed.

Id.

[292] *Id.* at 107 (Edmund-Davies, L.J.). He notes, however, that this may be attributable to the power of the Attorney-General to enter a *nolle prosequi* or to order the Director of Public Prosecutions to take over a case and then to offer no evidence. *Id. Quaere*, would the

It was the opinion of the House of Lords that the relator action is not something to be regarded as "archaic or obsolete."[293] Lord Justice Ormrod, in the Court below, had suggested that the Attorney-General's role in relator proceedings is essentially fictional and that in fact the litigant controls all aspects of the proceedings.[294] This was expressly rejected by Lord Wilberforce and by Viscount Dilhorne. Lord Wilberforce, while acknowledging that in times past the granting of permission by the Attorney-General to use his name was a mere formality, asserted that his role in relator proceedings has never been fictional and that in such proceedings the Attorney-General in no sense relinquishes control.[295] Viscount Dilhorne noted that while "the conduct of the proceedings in such an action is left in the hands of the relator, it is in his hands as agent for the Attorney-General and its conduct is always under his control and discretion."[296] It was futher asserted by Lord Wilberforce that the exclusive right of the Attorney-General to represent the public interest is neither "technical, nor procedural, nor fictional. It is constitutional."[297] He based his rejection of the suggestion that the standing of a public interest litigant should be left to the discretion of the Court on the separation of powers notion. In his opinion, the Court is an inappropriate and ill-equipped body for the making of decisions as to the public interest and the very fact that "decisions are of the type to attract political criticism and controversy shows that they are outside the range of discretionary problems which the courts can reslove."[298] The repetition of this inhibitory notion is evidenced throughout each of the separate opinions of the *Gouriet* case,[299] thus displaying a substantial influence on the decision of the Court to deny standing.

2. The Canadian Exceptions to the Rule Against Non-Interference

The Canadian Supreme Court, notwithstanding its reluctance to upset the delicate balance of the separation of powers by overtly scrutinizing the exercise of the Attorney-General's discretion, has recognized four basic exceptions to the role of the Attorney-General as the exclusive legal representative of the public interest. That is to say, rather than critically examining the refusal of the Attorney-General to bring public interest proceedings, the Court has merely recognized certain situations in which

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ultimate effect of such a power differ in any significant way from that of the civil courts to exercise their discretion to deny standing or to prohibit frivolous and vexatious litigants?

[293] *Id.* at 89.

[294] [1977] 1 All E.R. at 728-30.

[295] [1977] 3 All E.R. at 80.

[296] *Id.* at 94 (Dilhorne, L.J.).

[297] *Id.* at 83 (Wilberforce, L.J.).

[298] *Id.* at 84.

[299] *See, e.g., id.* at 95 (Dilhorne, L.J.); *id.* at 114 (Edmund-Davies, L.J.); *id.* at 119-20 (Fraser, L.J.).

an individual may stand in his own name before the court to advocate the public interest.

Two of these exceptions were clearly stated in an English authority decided by the Court of Appeal in 1903, *Boyce v. Paddington Borough Council*:[300]

> A plaiintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . .; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.[301]

The *Boyce* decision has been frequently cited with approval in subsequent Canadian cases for its articulation of these two exceptions to the general rule that the Attorney-General has exclusive standing to litigate public interest suits. One such case is *Cowan v. Canadian Broadcasting Corporation*,[302] in which standing was denied to a plaintiff who sought to advocate a public right. The plaintiff, a resident of Toronto, sought declarations and an injuction to forestall the conversion of a Toronto English language broadcasting station controlled by the defendant publicly-owned corporation into a exclusively French language station. It was his contention that if Parliament had authorized such a conversion, the enacting legislation was *ultra vires* and furthermore that the required expenditures for the conversion had never been authorized by Parliament.[303] The Ontario Court of Appeal found that the plaintiff, in his attempt to assert a purely public right, did not fit into either of the *Boyce* exceptions and that to do so, he must have been more "particularly affected than other people" by the allegedly illegal or unconstitutional action.[304]

The third exception to the rule precluding private plaintiffs from public interest litigation unless under the auspicies of the Attorney-General relates to taxpayer actions. *McIlreith v. Hart*[305] is the *locus classicus* which established that ratepayers have a right to bring action to challenge the validity of municipal expenditures. The standing for such action is to be based upon the allegation of threatened financial loss because of the additional or unnecessary taxes which will inevitably be imposed to replenish the treasury.[306] Prior to 1974, the notion of public interest standing for taxpayers, as heralded in *McIlreith*, was not considered to be

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[300] [1903] 1 Ch. 109 (C.A.), *aff'd sub nom.* Paddington Corp. v. Attorney-Gen., [1906] A.C. 1 (H.L.).

[301] Boyce v. Paddington Borough Council, [1903] 1 Ch. at 114.

[302] 56 D.L.R.2d 578 (Ct. App. Ont. 1966).

[303] *Id.* at 579.

[304] *Id.* at 580-81.

[305] 39 Can. S. Ct. 657 (1908).

[306] *See* G. STRAYER, *supra* note 21, at 117.

applicable outside of the muncipal context.[307]

B. *Standing for a Truly Public Interest Litigant*

1. *Thorson*

In 1974, the Supreme Court in Canada handed down a landmark decision which dynamically altered previous conceptions of the propriety of public interest litigation and which presented another exception to the conceived role of the Attorney-General as the exclusive legal representative of the public interest. In *Thorson v. Attorney-General of Canada*,[308] a private litigant who suffered no special damage and who asserted no special status beyond that of a citizen and a taxpayer was granted the opportunity to challenge the Canadian Official Language Act. Justice Laskin, in speaking for the majority, held that the question as to whether such a litigant has standing ultimately lies in the discretion of the court and that in exercising this discretion, the court should be mindful of the nature of the impugned legislation and the justiciability of the issues raised.[309]

As to the nature of impugned legislation, Laskin appeared to be drawing a pivotal distinction between the regulatory type on the one hand, and the declaratory type on the other. He noted that the former type of legislation, by its very nature, may produce a traditionally acceptable plaintiff so that *a fortiori* those taxpayers or citizens who are more "remotely affected" by such legislation should be excluded:

> Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme, they may properly claim to be aggrieved or to have a tenable ground upon which to challenge the validity of the legislation. In such a situation, a mere taxpayer or other member of the public not directly affected by the legislation would have no standing to impugn it.[310]

Whereas the legislation in the *Smith* case would be characterized by Laskin as being of the regulatory type, he characterizes the legislation in issue in *Thorson* as being both declaratory and directory. The Court was thereby able, by distinguishing *Smith*, to make way for a broader exercise of judicial discretion on the standing issue. This latter type of legislation, which creates no offenses, imposes no penalties, and lays no duties upon members of the public, is not, by its very nature, likely to produce a tra-

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[307] *See* Smith v. Attorney-Gen. of Ont., [1924] 3 D.L.R. 189 (Can.); Loggie v. Town of Chatham, 54 N.B. 230 (Ct. App. N.B. 1927).

[308] 43 D.L.R.3d 1 (Can. 1974).

[309] *Id.* at 17-18.

[310] *Id.* at 8.

ditionally acceptable plaintiff, for it usually affects all members of the public alike. Therefore, to deny standing to any one plaintiff asserting the public interest would be to deny standing to all.

Laskin voiced the same concern which was expressed in *Flast* but rejected in *Schlesinger* and *Richardson*. That is to say, if the plaintiff were denied access to the court, the validity of the impugned legislation would be effectively immunized from constitutional challenge because there would exist no other plaintiff in a better position to take up the cause. Such a result was seen by Laskin to be "strange and indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter tradtitonally within the scope of the judicial process, could be made the subject of adjudication."[311]

The desire of the Court to avoid the "alarming" consequence of constitutional immunity appeared to overshadow any of the inhibitory notions of judicial restraint. In the judgement of the court below,[312] however, the floodgates fear was determinative of the standing issue. Justice Houlden applied the restrictive rule articulated in *Smith* and was motivated by the same practical concerns. In the course of his reasons, he declared:

> If every taxpayer could bring an action to test the validity of a statute that involved the expenditure of public money, it would in my view lead to grave inconvenience and public disorder. It is for this reason, I believe, that the plaintiff has been unable to find any Canadian or English decision as authority for the position he is asserting.[313]

This *ab convenienti* argument was quickly dismissed by Laskin as adding nothing to the reasons for denying standing. In adopting the *Dyson* refutation, he emphasized the importance of the discretionary control which the courts can exercise over the flow of proceedings "by directing a stay, and by imposing costs."[314] He also noted that *McIlreith v. Hart*,[315] which opened wide the door to municipal ratepayer standing in 1908 "does not seem to have spawned any inordinate number of . . . actions."[316]

The second factor which the Court is to consider in the exercise of its discretion is the justiciability of the issues sought to be raised. In this respect, Justice Laskin asserted that the "question of the constitutionality of legislation has in Canada always been a justiciable question"[317] and that it is "the right of the citizenry to constitutional behaviour by

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[311] *Id.* at 7.

[312] Thorson v. Attorney Gen., 22 D.L.R.3d 274 (High Ct. Ont. 1971).

[313] *Id.* at 274.

[314] 43 D.L.R.3d at 6.

[315] 39 Can. S. Ct. 657 (1908).

[316] 43 D.L.R.3d at 7.

[317] *Id.* at 11.

Parliament."[318]

Probably more significant than any other aspect of the *Thorson* holding is this bold assertion of the right of citizenry to constitutional behaviour by Parliament with the implicit right of enforceability. The underlying concern appears to be that legislation not be immunized from constitutional challenge by judicial review. To deny standing to plaintiffs who are aggrieved by the effects of declaratory and directory legislation would create such an immunization.

The plaintiff in *Thorson* was accorded standing because of his status as a citizen, and because of rights flowing from that status, not merely because of his status as a taxpayer and the alleged tax burden resulting from an illegal expenditure.[319] While labelling the attempt to found standing on an alleged tax burden as "unreal," Laskin nevertheless engaged in an examination of the notion in a manner which would appear to lend some validity to its application. He disapproved of the way in which *Smith* restricted the doctrine of *McIlreith v. Hart*[320] to municipal ratepayers, asserting that a provincial or a federal taxpayer's tax burden resulting from an expenditure by their respective governments may be no less than that of a municipal taxpayer.[321]

In turning his attention to the American treatment of taxpayer standing, Laskin compared the *Frothingham* restriction to that in *Smith*.[322] He observed that both were invoked as a result of the same concerns about "multiplicity of actions, inconvencience and the fact that public and not special individual interest is involved."[323] The separation of powers doctrine, however, which was more apparent in *Frothingham*, was described by Laskin as "a more explicit matter in the United States than it is here."[324]

In conjectural fashion, one might query whether Laskin would have so quickly dismissed the separation of powers inhibition if *Thorson* had been decided subsequent to the judgement of the House of Lords in *Gouriet*. As evidenced in the above explication of this latter case, the notion of separation of powers persists in England as a ubiquitous inhibition

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[318] *Id.* at 19.

[319] *Thorson* is the quintessence of a public interest suit. The standing which is granted to the plaintiff is not based upon the assertion of injury (as for example, the financial injury to a plaintiff resulting from an illegal expenditure), but upon the assertion of the status of citizen and the rights which flow therefrom.

[320] 39 Can. S. Ct. 657 (1908).

[321] 43 D.L.R.3d at 16. The population of Metropolitan Toronto and Montreal is greater than that of each of seven of the Provinces of Canada. If the principle of *McIlreith* is applicable to municipal ratepayers' actions, why not to a provincial taxpayers' action to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge is open?

[322] *See id.* at 17, quoting Sutherland, J., in Massachusetts v. Mellon (Frothingham), 262 U.S. at 486-87.

[323] 43 D.L.R.3d at 17.

[324] *Id.*

to judical consideration of privately maintained public interest actions, notwithstanding the absence of constitutional barriers. In *Gouriet*, the House of Lords' unanimous and categorical statement that the Attorney-General is the exclusive legal representative of the public interest was influenced to a great extent by the judicial conception of the function of the Court within the confines of a tripartite allocation of powers. Any complaints arising out of the allegedly improper exercise of discretion by the Attorney-General, according to their Lordships, should be aired not in a legal, but a political forum.

In rendering his judgement in *Thorson*, Laskin cursorily considered the notion that public interest actions may not be brought to the court without the sanction of the Attorney-General. After briefly referring to the condition set forth in the *McWhirter* case, i.e. that a private person's right to instigate public interest proceedings is contingent upon a previous request having been made to the Attorney-General, and after remarking that, in any event, Thorson had met such a condition, Laskin expressed doubt as to its applicability to the Canadian federal system of government.[325] He noted that under the English unitary system of government, a challenge to the constitutionality of legislation — such as that in *Thorson* — would not arise and therefore, the role of the Attorney-General in that system as guardian of the public interest extends only to the bringing of proceedings against subordinate delegated authorities. This he contrasted with the Canadian federal system under which constitutional challenges may occur.[326] Implicit in his observation of the role of the Attorney-General as the "legal officer of a Government obliged to enforce legislation enacted by Parliament"[327] is the suggestion that because of the affinity between the Attorney-General and the government in power, he cannot always be relied upon to instigate, or consent to, proceedings to challenge the constitutionality of legislation, even if to do so might be in the public interest. In contrast to the emphasis placed by the Houue of Lords upon the immutability of the Attorney-General's exercise of discretion, Laskin focused upon the odiousness of the possible immunization from constitutional challenge of legislation, which may adversely affect the public in general, by the refusal of the Attorney-General to act.

In essence, Laskin appeared to be creating a fourth exception to the conceived role of the Attorney-General as the exclusive representative of the public interest, viz, independently maintained public interest actions which challenge the *constitutional* validity of legislative or official action.

As such, this exception would not stand to be altered by the application in Canadian courts of the *Gouriet* decision. The *Grouiet* principles can be distinguished, according to Laskin's treatment of *McWhirter*, as germane only to the English unitary system of government — where con-

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[325] *Id.* at 7.
[326] *Id.*
[327] *Id.*

stitutional challenges do not occur — and possibly to non-constitutionally based challenges to illegal official action in Canada.

Is this to say that the purview of the broader pronouncements which *Thorson* provides regarding standing does not extend beyond the constitutional context? Is the citizen or taxpayer type of standing fashioned in the *Thorson* case to be entirely unavailable to plaintiffs seeking to challenge illegal official action?[328] It would appear from the wording of *Thorson* — whcih is carefully limited to a constitutional context — that these questions are to be answered in the affirmative. Until a challenge to illegal official action by a litigant basing his standing upon *Thorson*-type grounds comes before the Supreme Court, however, the lines of demarcation cannot be drawn with any certainty.

Thus far, those cases which have considered the possible extension of the *Thorson* exception beyond the constitutional context have been discordant. The Federal Court of Appeal in *Re Rothmans of Pall Mall Canada Ltd. and Minister of National Revenue*[329] and the Ontario Court of Appeal in *Rosenberg v. Grand River Conservation Authority*[330] both held that the relaxed rules of standing articulated by *Thorson* did not extend to public interest suits for the challenge of illegal official action,[331] but the Manitoba Court of Appeal in *Stein v. City of Winnipeg*[332] and the Nova Scotia Court of Appeal in *Attorney-General of Nova Scotia v. Bedford Service Commission*[333] appear to have reached the opposite conclusion.

2. *McNeil*

One year after the *Thorson* decision, the Supreme Court of Canada was again confronted with a public interest action in which standing was in issue. Like *Thorson, Nova Scotia Board of Censors v. McNeil*[334] involved a constitutional challenge — this time to the validity of the Nova Scotia Theatres and Amusements Act[335] and some of the regulations promulgated thereunder. The plaintiff in *McNeil* was the editor of a provincial newspaper who was upset by the banning of the film, "Last Tango in Paris." In his action for a declaratory judgement, he alleged that the very establishment of the instrumentality of the movie censorship board by provincial statute constituted a violation of section 91 (27) of the B.N.A. Act as an encroachment on the federal criminal power.[336]

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[328] *See* Mullan, *Standing After McNeil*, 8 OTTAWA L. REV. 32, 42 *et seq.* (1976).

[329] 67 D.L.R.3d 505 (Ct. App. Can. 1976).

[330] 69 D.L.R.3d 384 (Ct. App. Ont. 1976).

[331] *Id.* at 395; *Re* Rothmans of Pall Mall Canada Ltd. and Minister of Nat'l Revenue, 67 D.L.R.3d at 513.

[332] 48 D.L.R.3d 223 (Ct. App. Man. 1974).

[333] 72 D.L.R.3d 639 (Sup. Ct. App. Div. N.S. 1976).

[334] 55 D.L.R.3d 632 (Can.1975).

[335] N. S. REV. STAT. c. 304 (1967).

[336] 55 D.L.R.3d at 634. *See* 84 D.L.R.3d 1, 22 (Can. 1978).

The legislation attacked in *McNeil* was clearly as regulatory as that in *Smith*. It created offenses and imposed penalties and by its very nature was likely to create a traditional type of plaintiff who could allege "exceptional prejudice" or "special injury," i.e. the theatre owners and operators and the film distributors. The discretion of the Court was nevertheless exercised so as to accord standing to the plaintiff as a representative of the members of the general public. In delivering the majority judgement in *McNeil*, Chief Justice Laskin emphasized that the regulatory/declaratory distinction suggested by the *Thorson* case could not be a controlling one.[337] In exercising its discretion to grant standing for the challenge of the regulatory legislation, however, the Court required that at least an arguable case be made out that the impugned enactment *directly affected* members of the public, and that there existed no other practicable means to test the constitutionality of the legislation.[338] In determining whether members of the general public were "directly affected" by the legislation in question, Laskin asserted that notwithstanding the fact that the Act directly regulated theatre operators and film distributors, it also "strikes at the members of the public in one of its central aspects.[339]

Laskin implicitly reiterated the concern he expressed in *Thorson* regarding the possible immunization of unconstitutional legislation in his adoption of the wording of Judge Hart, who originally considered the *McNeil* case:

> [t]he film exchange and theatre owners would not have an interest similar to that of the members of the public and there could be a large number of persons with a *valid desire* to challenge the prohibitory aspects of the legislation who have no vehicle through which to effect their purpose unless granted standing before the court.[340] (emphasis added)

While the notion of "valid desire" is not enucleated, the factual situation canvassed by the Court[341] revealed an apparent unwillingness on the part of those directly regulated to challenge the constitutionality of the impugned legislation and one can only surmise that this unwillingness existed because of a lack of principled motivation or "valid desire."

The undisguised examination by the *McNeil* Court of the factual situation was accompanied by an unabashed approbation of a joint standing/merits examination. The notion of standing as a strictly threshold determinant appears to hold little sway with the Supreme Court of Canada. According to Chief Justice Laskin, where

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[337] *Id.* at 635.

[338] *Id.* at 637.

[339] *Id.*

[340] *Id.* at 636, quoting the trial court opinion, McNeil v. Nova Scotia Bd. of Censors, 46 D.L.R.3d 259, 266 (Super. Ct. N.S. 1974).

[341] The Court adopted the statement of Justice Macdonald at the Appeal Division that "the factual situation has some relevancy to the determination of this question [of standing]." 53 D.L.R.3d 259, 266 (App. Div. N.S. 1974).

> [t]here is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing.[342]

In light of the fact that a "serious, . . . substantial constitutional issue"[343] was raised by the plaintiff for adjudication, that he had taken "all steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration,"[344] that those more directly affected had not taken a litigious initiative and that "there appear[ed] to be no other way, practically speaking, to subject the challenged Act to judicial review,"[345] the Court considered the action was an appropriate one in which to accord standing.

IV. A Comparative Analysis

The foregoing examination reveals certain essential differences in the treatment of the concept of standing in relation to public interest litigation by the Canadian and American Courts. One major distinction which goes to the very heart of the matter involves the respective perceptions of the Court as "guardian of the Constitution." In Canada, reference proceedings facilitate the *per se* consideration of the constitutionality of legislation by the judiciary. Futhermore, as was confirmed in *Thorson*, the "question of the constitutionality of legislation has [in Canada] always been a justiciable question."[346] In the United States, however, where there is "no power *per se* to review and annul acts of Congress on the ground that they are unconsitutional,"[347] there is a general judicial reluctance to confront constitutional issues unless unavoidable.[348] Since the landmark decision of *Marbury v. Madison*,[349] it has been within the recognized powers of the Judiciary to rule on the constitutionality of legislation, but only when crucial to the determination of actual cases or controversies brought to the Court by proper parties.

Secondly, there exists in Canada a recognized "right of the citizenry to constitutional behaviour by Parliament,"[350] together with an implicit right of enforceability by public interest litigants when no other means of challenge is apparent.[351] The prevailing concern is that ostensibly uncon-

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[342] 55 D.L.R.3d at 633-34.
[343] *Id.* at 634.
[344] *Id.* at 635.
[345] *Id.* at 637.
[346] Thorson v. Attorney Gen. of Can., 43 D.L.R.3d at 19.
[347] Massachusetts v. Mellon (Frothingham), 262 U.S. at 488.
[348] *See* note 45 *supra*; *see also* text accompanying notes 221-23 *supra*.
[349] 5 U.S. (1 Cranch) 137 (1803).
[350] Thorson v. Attorney Gen. of Can., 43 D.L.R.3d at 19.
[351] *See* text accompanying notes 317-19 *supra*.

stitutional legislation not be immunized from public challenge. Notwithstanding the notoriety of the 'inalienableness' of American constitutional rights, there exists in the United States no such right to challenge unconstitutional legislation.[352] Whereas in Canada the "no other plaintiff" notion is a plus factor in the exercise of the Court's discretion on the standing issue, the American Court has recently suggested that the absence of a more appropriate plaintiff is indicative of the political nature of the issue and hence the impropriety of judicial intervention.[353]

Thirdly, the American constitutionalization of the standing concept must be distinguished from the Canadian discretionary approach. While the application of standing principles in the United States at times reflects the admixture of constitutional requirements and a policy of judicial restraint, there does not exist the same constitutional freedom that the Canadian courts have to confer discretionary standing.[354]

A fourth distinguishing feature lies in the consideration by the Court of the aspect of justiciability. The Canadian Court may properly consider the justiciability of the issues raised as one of several relevant aspects[355] in the exercise of its discretion on the question of whether to confer standing. The American conception of justiciability is somewhat different: justiciability is seen as the broader rubric under which standing is merely an aspect,[356] and as the "term of art" used to describe the constitutional limitation set forth by article III.[357] According to the Court in *Flast*, the fact that the substantive issues in the litigation might not be justiciable is not a relevant factor in determining the standing of the prospective plaintiff.

This brings us to the fifth major distinguishing feature. In two of the Canadian cases discussed above, *Smith* and *McNeil*, the Court displayed a tendency to engage in a concomitant examination of the merits with the incipient determination of standing. This is to be contrasted with the approach of the American Court which persistently refers to standing as a "threshold determinant" which must be undertaken in advance of any consideration of the merits. It should, however, be noted that this distinction is largely one of word and not of deed, for the American Court often looks prematurely at the merits either under the pretence of causational analysis or under the pretence of ruling on the standing issue when in actual fact they wish to disguise a decision on the merits.[358]

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[352] *See* text accompanying notes 87-89 *supra*.

[353] *See* text accompanying note 230 *supra*.

[354] An academic argument has been made, however, that the constitutionalization of "injury in fact" was not essential under a historical interpretation of Article III. *See* Jaffe, *supra* note 2, at 1034-37; Berger, *supra* note 108, at 817-19.

[355] Other relevant aspects include the nature of the legislation, the availability of other plaintiffs or other means of challenge, etc.

[356] *See* text accompanying notes 79-80 *supra*.

[357] Flast v. Cohen, 392 U.S. at 95.

[358] *See* text accompanying note 267 *supra*; *see also* Tushnet, *supra* note 8, at 663-64,

V. SYNOPSIS

The purpose of this article has not been to attempt an enucleation or collation of the various catchwords or shibboleths of standing,[359] nor to undertake an intricate comparative analysis of the treatment of the concept of standing in the United States and Canada,[360] nor to assay the exigency of the very existence and application of the concept. Rather, it has been to propound a rational conceptual framework[361] within which the judicial application of the concept of standing can be examined and to determine the relationship of standing as seen within this framework to the phenomenon of public interest litigation. The evolution of the variously articclated shibboleths of standing in the American and Canadian Courts has been traced to demonstrate the efficacy of the propounded conceptual framework as a practical tool in the dissection of the standing concept.

The Courts are keenly aware of the potential ramifications of judicial intervention into public interest controversies and as a result, they choose to either extend or withdraw "the arm of justice" according to the cumulative magnitude of the prevailing notions inhibiting such intervention. The role of the Court, the power of the Court, the limited resources of the Court - these inhibitory notions, notwithstanding the constant judicial modification in the articulation of the shibboleths of standing, have consistently influenced the hospitableness of the judiciary to public interest litigants and *a priori* will continue to do so.

The adoption and application of the propounded conceptual framework in the didactics of the concept of standing is therefore urged so that theory and practice may correspond and so that the concept will cease to be described as "among the most amorphous in the entire domain of public law."[362]

699-700.

[359] The word "shibboleth" is used in the sense of a test word or password. As the above outline of cases has indicated, certain specific assertions must be made by public interest litigants in order to persuade the Court of the appropriateness of their representational status. The author suggests that these specific assertions operate symbolically as shibboleths in that the failure to express the same to the satisfaction of the Court will result in the prospective litigants being turned away from the door of the Court at its very threshold. Some of the shibboleths of standing are: "injury in fact," "direct concrete injury," "special interest," "exceptional prejudice," "directly affected," "zone of interests" and "personal stake."

[360] The question of the extent to which the Canadian "novel approach" to standing would be advantageous, if indeed adaptable to the United States, is examined in Wilson, *supra* note 67.

[361] *See* Tushnet, *supra* note 8, at 663.

[362] *See Judicial Review Hearings, supra* note 6, at 498 (statement of Paul A. Freund).